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# IFAR Journal

INTERNATIONAL FOUNDATION FOR ART RESEARCH

## THE WHO, WHAT, WHY AND HOW OF THE CULTURAL PROPERTY ADVISORY COMMITTEE (CPAC)

PLUS

The Sale That Wasn't — Disputed Saint Laurent Chinese Bronzes Still in Limbo

U.S. Ratifies Hague Convention

Art Collectors and Copyright

To See Art or to Save It

INCORPORATING **STOLEN ART ALERT**

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**COVER:** Two 18th Century Qing Dynasty bronze fountainheads: *Rat*, 30 x 40 cm (11¾" x 15 ¾") and *Rabbit*, 45 x 35 cm (17 ¾" x 13 ¾"), part of the Yves Saint Laurent - Pierre Bergé Collection sold at Christie's, Paris, February 25, 2009 (Lot nos. 677 & 678). See story on p. 2.

# The Sale That Wasn't

## DISPUTED SAINT LAURENT CHINESE BRONZES STILL IN LIMBO AFTER AUCTION

Two months after the controversial Christie's auction in Paris of two Qing Dynasty Chinese bronze animal heads — a *Rabbit* and *Rat* **(FIGS. 1 & 2)** — which the government of China said belonged to *it* and wanted repatriated, the bronzes have still not been paid for by the winning bidder. Nor is it clear what course of action Christie's or the consignor will pursue. Christie's told IFAR that it would not make any further public comments, and reiterated that "ownership of any Lot does not pass to the buyer until full payment has been received by Christie's." The one thing that is clear: the bronzes are not in China.

The winning bidder, Cai Mingchao, owner of an auction house in Xiamen, China and an advisor to the Lost Cultural Relics Recovery Foundation, a group involved with bringing dispersed Chinese artifacts back to China, bid 14 million Euros (17.9 million USD) anonymously by phone for *each* of the heads, and then reneged, ostensibly to make a political statement. It wasn't until five days after the sale that he made his name public and announced his intentions — "I am not going to pay" — at a news conference in Beijing. The following week, he told *Bloomberg News* (March 10, 2009) that, after bidding, he began "to think that accepting the bronzes was like buying 'two time bombs and placing them at home, not knowing when they will explode'." He insisted that he acted independently, and not on behalf of the Chinese government.

**FIGURES 1 & 2. 18th Century Qing Dynasty bronze fountainheads of a *Rabbit* (TOP), 45 x 35 cm (17 ¾" x 13 ¾") and a *Rat* (BOTTOM), 30 x 40 cm (11¾" x 15 ¾"). Both are part of the Yves Saint Laurent - Pierre Bergé Collection sold at Christie's, Paris, February 25, 2009 (Lot nos. 677 & 678), despite protests from China.**

The consignor of the bronzes, Pierre Bergé, is the long-time business and life partner of noted fashion designer Yves Saint Laurent, who died in 2008. The heads were only two of the many highlights from a spectacular three-day sale (February 23–25) at the Grand Palais in Paris of more than 700 works from the Saint Laurent-Bergé Collection, which, despite the downturn in the economy, set many auction records. The proceeds have been designated for philanthropic activities. The collection spanned periods and media and included works by 19th and 20th Century masters; furniture — including an Art Deco armchair by Eileen Gray that sold for a record-setting 21.9 million Euros; Old Master paintings; and antiquities.

### THE BRONZE HEADS

But the objects from the collection that garnered the most press were the two 18th century Qing Dynasty bronze heads, which once adorned a horological fountain in the garden of the Emperor Qianlong's Old Summer Palace — known as the Yuanming Yuan — just outside of Beijing. They are two of twelve realistically designed, thinly cast, Chinese Zodiac animal heads with

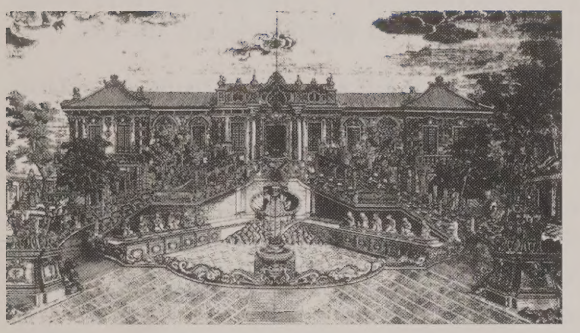

**FIGURE 3.** Historic drawing showing the original 18th Century Zodiac Fountain at the Yuanming Yuan; 12 figures (with animal heads and human bodies) flank left and right.

**FIGURE 4.** Historic print from the French publication *L'Illustration* (22 December 1860) showing the looting of the Old Summer Palace.

clothed, human bodies that flanked the fountain **(FIG. 3)**, each head spouting water for two hours in the day, while, at noon, all spouted water at once. The bodies were made of stone; only the heads were cast in bronze. Commissioned by the Manchu Emperor Qianlong (1736–1795), who was attracted to "exotic" architectural styles, the bronze animal heads and fountain are quasi-European. They were designed by European Jesuit missionaries employed at the court — an Italian, Guiseppe Castiglione, and a Frenchman, Michel Benoist — for a section of the imperial Summer Palace complex that was devoted to European-style palaces and gardens.

The Old Summer Palace was destroyed by French and British troops in 1860 during the Second Opium War, in retaliation for the torture and murder of 18 emissaries who had been sent as peace negotiators. The destruction was so extensive — provocation notwithstanding — that it was decried even in Europe at the time,[1] and the Chinese have pointed to it as a symbol of the barbarism of European imperialism. Looting followed the burning of the palaces **(FIG. 4)**, but it is not clear *exactly* how, and by whom, these 2 bronze animal fountainheads and the 5 others that have turned up in the West so far, got here. For the Saint Laurent bronzes, Christie's provides a provenance (and photograph) going back only to José Maria Sert y Badia, the Spanish painter born 1874, died 1945.

" . . . China strongly protested the inclusion of the fountainheads, claiming them as part of its cultural heritage. However true, China's *legal* claim is tenuous at best."

## LEGAL ARGUMENTS

When the Saint Laurent-Bergé auction was announced, the government of China strongly protested the inclusion of the fountainheads, claiming them as part of its cultural heritage. However true, China's *legal* claim is tenuous at best. Christie's, which engaged in extensive discussions with the Chinese before the sale, insisted that the sale was legal and that Bergé had full title to the objects. The French courts agreed. Only two days before the sale (which took place on the third day of the auction), the Tribunal de Grande Instance in Paris ruled in favor of Bergé and against the Association for the Protection of Chinese Art in Europe (APACE), the organization that agreed to be the plaintiff in the suit

[1] In 1861, Victor Hugo compared Britain and France to "two robbers breaking into a museum" and "leaving . . . with their bags full of looted treasures." See, Victor Hugo, *Expédition de Chine: Hauteville-House* (a letter dated November 25, 1861), cited in *The Story of Yuanming Landscape Gardens* (Beijing, China: Yuanming Landscape Gardens Administrative Bureau, 1998) p. 59.

to stop the sale. The court ordered APACE to pay a 1000 Euro fine each to Christie's and Bergé. The Chinese government, although it spoke out publicly against the sale, was not a party to the suit.

There are several international legal agreements and conventions governing the transfer of cultural property and archaeological objects, but none are retroactive to 1860. The 1995 UNIDROIT Convention[2] only governs thefts going back 50 years and a suit must be commenced within 3 years from when the claimant becomes aware of the object's current location; and the 1970 UNESCO Convention[3] is not retroactive. China is a party to both conventions.

China's best chance to reclaim items such as these is for them to be purchased by China from their current owners, or purchased by Chinese individuals, privately or at auction, and then donated to the government. In fact, Christie's has stated that Bergé offered the bronzes to China before the auction at a price (believed to be $10 million each) considerably below what the underbidder at the auction bid, but China refused. The other 5 animal fountain heads from the Yuanming Yuan that have turned up in the West were purchased and then brought back to China. In 2007, for example, Macao Casino owner, Stanley Ho, purchased a bronze *Horse* for 8.9 million USD just before it was to be sold at Sotheby's Hong Kong (Lot #1321), and donated it to the government. In 2003, he had purchased the *Boar* privately for $770,000 and donated it to the Poly Group Museum in Beijing, which has 3 of the other animal fountainheads. The price of these bronzes has escalated in recent years (perhaps because of China's interest in getting them back). The same *Horse* that Ho purchased for $8.9 million in 2007, was sold at Sotheby's London in June 1989 for only $267,000 (Lot #69).

> "The bronzes have still not been paid for by the winning bidder. Nor is it clear what course of action Christie's or the consignor will pursue."

## NEXT STEPS

Christie's has not shown its hand, and told IFAR that it will not "comment or speculate on the next steps that [it] might take." An auction bid, however, is a legally binding contract, so Christie's could:

- choose to sue Cai Mingchao (highly unlikely);
- return the work to Bergé; or
- try to sell the bronzes privately, perhaps to the underbidder.

No doubt, Christie's (and probably Sotheby's as well) is assessing the implications of the withdrawn bid and its potential damage to the integrity of the auction process. Perhaps it is also reassessing its pre-auction vetting of bidders. Cai Mingchao was apparently registered and approved last minute because he was a known buyer, having paid almost $15 million USD in 2006 for a bronze Buddha at an auction at Sotheby's, Hong Kong.

The *Rat* and *Rabbit* still belong to Pierre Bergé, and, as far as we know, remain in the possession of Christie's in Paris. Just before the sale, Bergé publicly offered the bronzes to China for free, if China would agree to "observe human rights and give liberty to the Tibetan people and welcome the Dalai Lama," an offer that he clearly knew would not be accepted, but which, presumably, remains on the table.

**— S. F.**

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2 *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, Rome, 24 June 1995. China became a party, with reservations, in July 1998.

3 *The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 17 November 1970. China became a party in February 1990.

# After Half a Century, U. S. Ratifies Hague Convention

It was a long time coming, but the United States has finally become a party to the most important international convention affecting protection of cultural heritage in time of war — the 1954 Hague Convention.[1]

The U. S. Senate ratified the Convention[2] (with "understandings") on September 25, 2008. The instrument of ratification was deposited at UNESCO on March 13th **(FIG. 1).** In June 2009, three months after deposit, the Convention will officially enter into force, and the U.S. will join the 122 other countries that are already State Parties.[3] The Convention is self-executing, so implementing legislation is not required.

Few significant changes will actually result from the ratification. The U.S helped negotiate the Hague Convention in the wake of the devastation to cultural heritage during World War II, and the Convention itself was modeled on General Eisenhower's instructions to the military to help protect Europe's cultural treasures. The U.S. was an early signatory to the Convention (though not a party to it) and has essentially complied all these years with "the Convention's conduct-regulating provisions under general principles of international law and custom."[4]

Ratification, however, does bring with it symbolic and potential practical benefits. The legal advisor to the State Department testified last year[5] that ratification, even after all these years, will "promote U.S. international security interests . . .," will allow the U.S. "to participate fully in meetings of states parties . . .," and "will significantly strengthen our negotiating leverage and credibility in our work on other law of war treaties." Not insignificantly, he added, it will also persuade other countries to follow our example. As it happens, the United Kingdom, which is not a party to the Convention, has indicated its intention to ratify it.

**FIGURE 1. U.S. Chargé d'Affaires, Stephen Engelken, presenting the instrument of ratification to UNESCO's Director-General Koïchiro Matsuura on March 13, 2009. Photo: © UNESCO/Michel Ravassard**

Perhaps most significantly, ratification underscores our national commitment to protect cultural heritage during war or limited armed conflicts, and is expected to have some impact on military planning and training.

## WHY DID IT TAKE SO LONG?

Why did it take almost 55 years for the U.S. to ratify a convention that we, ourselves, helped draft? The answer, according to James Nafziger, a professor of art law and

1 *Convention for the Protection of Cultural Property in the Event of Armed Conflict,* signed 14 May, 1954; entered into force on 7 August 1956. For the full text of the Convention, see: http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html. The text is also available in the Art Law/Cultural Property section of IFAR's Website: www.ifar.org

2 Under Article II, §2, of the U.S. Constitution, treaties require the advice and consent of the Senate by a two-thirds majority, before the U.S. President can give notice of ratification.

3 For an up-to-date list of State Parties to the Convention, see: http://erc.unesco.org/cp/convention.asp?KO=13637&language=E

4 See James A.R. Nafziger, "Protection of Cultural Heritage in Time of War and its Aftermath," in *IFAR Journal,* Volume 6, nos. 1 & 2 (2003), pp. 61, for this comment and also a substantive discussion of the Hague Convention and its two Protocols, specifically in light of the damage to cultural artifacts in Iraq in April 2003.

5 Testimony of John B. Bellinger, Legal Advisor, Department of State, April 15, 2008, before the United States Senate Committee on Foreign Relations regarding ratification of the Hague Convention.

head of the International Law Association's Committee on Cultural Heritage, lies in "Cold War anxieties, particularly about the implications of expected nuclear conflict."[6]

"Why did it take almost 55 years for the U.S. to ratify a convention that we, ourselves, helped draft?"

However, even when the Cold War ended, ratification was stalled. The cause: largely bureaucratic inertia. President Bill Clinton sent the ratification documents to the Senate in January 1999, where they languished – in the Foreign Relations Committee – ever since. Fifteen organizations – including the Archaeological Institute of America, the Lawyers Committee for Cultural Heritage Preservation, and the College Art Association – can now take at least some credit for helping to move the Senate to action. These groups made ratification a high priority and formed a coalition that provided key testimony to the Senate in April 2008.

## "UNDERSTANDINGS"

The U.S. ratification was qualified by the addition of one declaration and four "understandings".[7] These were intended to clear up "ambiguities in language" and also, it would appear, to let the U.S. military act without undue restraint in time of war. In brief, the qualifications state that: "It is the understanding" of the U.S. that:

- ". . . 'special protection' as defined in the Convention . . . prohibits the use of any cultural property to shield any legitimate military targets from attack, and, second, allows all property to be attacked . . . if required by military necessity . . . "
- military decisions "shall only be judged on the basis of the person's assessment of the information reasonably available to the person at the time the person planned, authorized, or executed the action under review . . ."
- ". . . the rules established by the Convention apply only to conventional weapons . . ."
- ". . . the primary responsibility for protection of cultural objects rests with the Party controlling that property, to ensure that it is properly identified and that it is not used for an unlawful purpose."

As to the declaration, it made clear that the "Convention does not confer private rights enforceable in the United States Courts."

It remains to be seen how effective the Hague Convention will be in protecting cultural heritage in future wars. Its history of success thus far has been mixed. While its role in the First Gulf War of 1991 was relatively positive, it was far less effective during the fighting in the former Yugoslavia, where cultural sites in Dubrovnik and Mostar were deliberately targeted.

There are two Protocols to the 1954 Hague Convention, dating from 1954 and 1999, which impose additional obligations on State Parties. They were not considered for ratification at this time.

—S.F.

[6] Nafziger, *IFAR Journal*, 2003, op. cit., p. 61.

[7] For a full text of the Understandings, see the Cultural Property Observer Website: http://culturalpropertyobserver.blogspot.com/2008/09/us-senate-finally-ratifies-1954-hague.html.

## *IFAR JOURNAL* WINS AWARD—*AGAIN*

We are very pleased to announce that the *IFAR Journal* has won First Prize in its category in the 2009 American Association of Museums' Publications Contest. The *Journal* will be displayed with other contest winners at the AAM's Annual Conference in Philadelphia April 30 – May 3.

This the fourth time that the *IFAR Journal* has won an award in the AAM's Annual Publication Contest. Needless to say, we are deeply honored and delighted. Kudos to our designer, Ana Lucia Rosales-Boujnah, and to our editorial and production team: Dr. Sharon Flescher, Editor-in-Chief, and Kathleen Ferguson, Editor. A thank-you as well to all the writers and Advisory Council members and others who've contributed to the success of this still relatively new publication (introduced in 1998). A heartfelt "thank you" to all our funders, whose support enables us to continue our work, and a special "thank you" to those funders who have specifically supported the *IFAR Journal,* including: the Pierre and Tana Matisse Foundation, The Liman Foundation, the National Endowment for the Arts, and the International Music and Art Foundation.

The *IFAR Journal* goes to subscribers in 19 countries, is incorporated into the curricula of many universities, and its articles are frequently cited and reproduced.

### LETTERS TO THE EDITOR

**REMINDER**

"Letters to the Editor" are welcome in *IFAR Journal.* Please keep letters brief. We reserve the right to edit for length. All letters must be signed. Please fax or mail letters to:

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# New Moves in Cultural Property Pacts and on the Committee

## U.S. AND CHINA SIGN A BILATERAL AGREEMENT • CAMBODIA AND HONDURAS AGREEMENTS WITH U.S. EXTENDED AND AMENDED • MAJOR CHANGES AT CPAC

### AGREEMENT WITH CHINA

Less than a week before the Administration changed from Bush to Obama, the United States approved a long-pending request from China to restrict the importation into the U.S. of a broad range of Chinese cultural objects said to be in jeopardy of pillage.

"Broad as the range is — almost 76,000 years — it is nowhere near as sweeping as China's original request, submitted in May 2004 . . ."

The bilateral agreement — in the form of a Memorandum of Understanding (MOU) — was signed on January 14 of this year, the 30th anniversary of the re-opening of diplomatic relations between China and the U.S. The agreement covers archaeological and other cultural material from the Paleolithic Period (c.75, 000 BC) through the Tang Dynasty (ending in 907 AD). It also includes all "monumental sculpture and wall art at least 250 years old."

Broad as the range is — almost 76,000 years — it is nowhere near as sweeping as China's original request, submitted in May 2004, which covered objects from the Paleolithic Period through the end of the Qing Dynasty — 1911. On the other hand, pre-1759 monumental sculpture and wall art is specifically restricted under the agreement, but was not specified in the original request.

As with all bilateral agreements signed under the 1983 Cultural Property Implementation Act (CPIA) — the implementing legislation for U.S. participation in the 1970 UNESCO Convention[1] — the import restrictions remain in effect for five years, until January 2014, unless extended. Like all MOUs, the agreement with China can be extended for an indefinite number of five-year periods. (For an in-depth discussion of the CPIA, see the feature story in this issue of *IFAR Journal*.)

A detailed list — more than 8 pages long — of the categories of artifacts covered under the MOU was published in the Federal Register on January 16.[2] The categories include ceramic stoneware and porcelain vessels; ornaments and jewelry; sculpture; musical instruments; and tools and weapons. Significantly, coins are also covered under the new agreement. These have not traditionally been included in import restrictions under the CPIA, but were included for the first time in a controversial 2007 bilateral agreement with the government of Cyprus.

Objects that fall within the restricted categories can no longer be brought into the U.S. as of January 16, 2009, unless:

- they are accompanied by an export certificate from the government of China;
- they have documents showing that they left China prior to the effective date of the embargo.

The burden of proof will be on the importer, and works lacking these documents will be subject to seizure.

1 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 17 November 1970.

2 Federal Register, Volume 74, no. 11. For the text of the MOU and a Web link to the Federal Register, see the U.S. State Department Website: http://culturalheritage.state.gov/whatsnew.html. See also, the section on Art Law on IFAR's Website: www.ifar.org.

China's 2004 request to the U.S. was extremely controversial, and not just because of its broad scope. Critics said that China itself was not doing enough to police the looting. They noted that the U.S. market for Chinese objects is relatively small compared to the market in both in China and in other countries, such as Japan. Therefore, the Chinese request didn't meet the requirements ("determinants") for import restrictions under the CPIA, and a U.S. embargo would have little effect on looting. However, they feared it *would* have a negative effect on the ability of American museums and collectors to acquire Chinese objects and educate the public.

IFAR devoted a special issue of the *IFAR Journal* (Volume 7, nos. 3&4) to the pros and cons of China's request, and published eight of the 23 public pro and con statements that were originally submitted to the Cultural Property Advisory Committee (CPAC) in February 2005. Among those in opposition were four museum directors and an art dealer. In favor, were archaeologists and others mindful of the extent of archaeological looting in China. It is probably not surprising that, more than four years later, even with a revised agreement, those previously in favor and those opposed have reacted differently to the new agreement.

Patty Gerstenblith, a professor of cultural heritage law at DePaul University, who spoke in favor of the original Chinese request, recently told IFAR:

> "I am glad that the US-China agreement has gone into effect, although it was too long in coming. I think a good balance was struck, in satisfying the statutory criteria, by protecting movable archaeological objects that date up to the 10th century and architectural and wall fragments up to the maximum permitted by the CPIA – that is, materials that are more than 250 years old."

In contrast, James J. Lally, a prominent New York dealer in Chinese objects who was strongly opposed to the request, told IFAR that, by approving the request:

> "The government has done a great disservice to American museums and to anyone in America who has an interest in Chinese art and culture. And inside China, where the vast majority of Chinese art is traded and collected today, nothing will change."

Perhaps in response to concerns such as Lally's, the MOU stipulates actions that China needs to take, including:

1. increasing the "funding and professional resources for the protection of cultural heritage";
2. making "every effort to stop archaeological material looted or stolen from the Mainland from entering" Hong Kong and Macao, which are currently major markets for the illicit trade; and
3. promoting "long-term loans of archaeological objects . . . for public exhibition, education, and research purposes."

It remains to be seen whether these steps will satisfy the critics.

## Renewed Agreements with Cambodia and Honduras

### CAMBODIA

In September 2003, Cambodia became the first country in Asia to sign a bilateral agreement (a MOU) with the United States under the Cultural Property Implementation Act, CPIA (see *IFAR Journal,* Vol. 6, no. 4). The agreement restricted importation into the U.S. of

cultural objects at risk of pillage dating from the Bronze Age through the Khmer Era. It followed on the heels of a 1999 emergency action by the U.S. to restrict importation of a more limited group of objects.

Now a new agreement between the U.S. and Cambodia amends and extends the bilateral agreement for an additional five-year period, through September 19, 2013. The new agreement includes an additional category of restricted objects: stone, metal, ceramic, glass, and bone archaeological objects from the Bronze and Iron Ages.[3] As with the China agreement, objects falling into the restricted categories will not be allowed into the U.S. without an export permit from Cambodia or documents proving that they left that country before the dates of the respective agreements.

When Cambodia's 5-year agreement was drawing to a close, the Cultural Property Advisory Committee (CPAC) held hearings regarding Cambodia's request for an extension. CPAC is the government group responsible for recommending a course of action concerning requests by foreign countries for import restrictions under the CPIA. At the hearings, Cambodia's Ambassador admitted that "the Cambodian military was responsible for looting many archaeological sites."[4] Perhaps in response to his admission — common knowledge in any case — the September 2008 agreement includes a demand on Cambodia "to use its best efforts to . . . reduce corruption that undermines efforts to protect Cambodian cultural patrimony from pillage and illicit trafficking" (Article II, F).

## HONDURAS

On March 12 of this year, the U.S. and Honduras renewed the bilateral agreement under the CPIA originally signed in March 2004. This imposed import restrictions on endangered Pre-Columbian archaeological artifacts. The agreement was extended for an additional 5 years, until March 2014.

While the categories of restricted objects remain the same, the agreement was revised to include a new Article II. This outlines steps that Honduras must take under the agreement to insure that the U.S. import restrictions would not be the only means of protecting the endangered archaeological artifacts. Honduras must enforce its existing laws protecting cultural heritage, and enlist the cooperation of other "countries with significant import trade in Honduran archaeological artifacts to protect its cultural property."

The addition of "conditions" into the renewal agreements with both Cambodia and Honduras suggest that the U.S. government – and the Cultural Property Advisory Committee – are responding to critics who have complained that some of the terms of the original CPIA have not been adhered to, and that the threshold for approving and renewing requests by foreign governments has previously been too low (see discussion on CPAC in this issue of the Journal). Restrictions under the CPIA were intended to be taken "in concert" with other actions to reduce the risk to cultural heritage from pillage.

In addition to the bilateral agreement with Honduras under the CPIA, a 1973 U.S. law – the Pre-Columbian Monumental or Architectural Sculpture or Murals Statute – governs importation into the U.S of monumental or architectural sculpture or murals, not just from Honduras but from all of Latin and South America.

3 The text of the MOU can be found on the State Department's Website: http://cuturalheritage.state.gov/Cambodia2008MOU.pdf as well as IFAR's Website: www.ifar.org.

4 See, Peter Tompa, Cultural Property Observer Blogspot, September 20, 2008.

## NEW CPAC APPOINTMENTS

Without much publicity, and not posted on the State Department Website,[5] there have been several recent changes in the make-up of the Cultural Property Advisory Committee (CPAC).

By law, the Committee is designed to be representative of the constituencies most affected by its decisions, but, at times, the Committee has come under fire for not being sufficiently representative. Its eleven members, appointed by the White House, include two people representing the interests of the museum community; three representing the archaeological, anthropological, and ethnographic communities; three "experts in the international sale of cultural property"– in other words, dealers or collectors; and three people representing "the interest of the general public." Members serve renewable three-year terms, or until they are replaced.

Since summer 2008, three new members have been named to CPAC — all Bush appointees. In addition, there has been a change in the Chairmanship; and one controversial appointment announced by the White House, has not materialized.

The new appointees are:

- Ronald Hall, a dealer in 19th & 20th Century art and President of Hall Galleries in Dallas, Texas
- David B. Jones, Principal and Managing Partner, DINI Partners, a fundraising consulting firm in Houston, Texas.
- Robert C. O'Brien, an attorney and managing partner at a Los Angeles law firm, Arent Fox LLP.

5 The State Department Website is being redesigned and the Cultural Property section has not been regularly updated. As of mid April 2009, the names of CPAC members are not listed, nor have they been posted for several months, ever since the new appointments were made. Maria Kouroupolas, Executive Director of CPAC, kindly provided an up-to-date listing for the *IFAR Journal*.

"Since summer 2008, three new members have been named to CPAC . . . ; there has been a change in the Chairmanship; and one controversial appointment announced by the White House has not materialized."

Mr. Hall occupies the dealer position previously held by Meredith Long. Mr. Jones and Mr. O'Brien are both "public representatives," and replace two Floridians who held those positions: Jay I. Kislak, who was Chairman of the Committee from 2003 – 2008 (see edited talk by Mr. Kislak in this issue of *IFAR Journal*), and Marta Araoz de la Torre.

Katharine Lee Reid, retired Director of the Cleveland Museum of Art, replaced Jay Kislak as Chair. She was already a member of the Committee. In 2005, Ms. Reid, then president of the Association of Art Museum Directors (AAMD) and speaking on behalf of AAMD, was one of the four museum directors who made a public statement to CPAC in opposition to the Chinese request for import protections.

Notably absent from the new appointments is Brent R. Benjamin, Director of the Saint Louis Museum of Art. A White House press release dated September 29th had announced his appointment to CPAC as a replacement for Willard Lee Boyd in one of the museum slots. But the announcement caused a backlash, as the Saint Louis Art Museum has been embroiled in a dispute with Egypt over an ancient funerary mask that Egypt claims was stolen.[6]

Now, six months after the announcement by the White House, Mr. Benjamin's name is not included in the current list of CPAC members (as sent to IFAR by the Executive Director of CPAC), while Mr. Boyd is still a

6 See, for example, the discussions against the appointment on the Websites operated by the Museum Security Network and SAFE, and, for the appointment, the Cultural Property Observer.

Committee member. Presumably, the Benjamin appointment is dead, since these are Presidential appointments, and there is a new President in the White House.

Below is a complete list of Cultural Property Advisory Committee Members as of April 2009, with the constituency whose interests they represent:

- **Katharine Lee Reid, Chairperson;** Retired Director, Cleveland Museum of Art [MUSEUM]
- **Willard Lee Boyd,** Professor of Law & President Emeritus of the Field Museum [MUSEUM]
- **Joan Breton Connelly,** Professor of Classics and Art History, New York University [ARCHAEOLOGY]
- **Ronald Hall,** Dealer, 19th & 20th Century Art [INTERNATIONAL SALES EXPERT]
- **Winton S. Holladay,** Trustee, National Museum of Women in the Arts [PUBLIC]
- **David B. Jones,** Principal and Managing Partner, DINI Partners [PUBLIC]
- **Robert Bruce Korver,** Marketing Consultant, Heritage Galleries and Auctioneers [INTERNATIONAL SALES EXPERT]
- **James Lorand Matory,** Professor of Anthropology and of African and African - American Studies [ANTHROPOLOGY]
- **Robert C. O'Brien,** Attorney, Arent Fox LLP [PUBLIC]
- **Nancy Clausen Wilkie,** William H. Laird Professor Classics, Anthropology and the Liberal Arts, Carleton College [ARCHAEOLOGY]
- **James Wright Willis,** James Willis Tribal Art [INTERNATIONAL SALES EXPERT]

— S. F.

■ ■ ■

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## EXPANDED IFAR WEBSITE OFFERS TWO MAJOR NEW RESOURCES

**IFAR is pleased to introduce its redesigned and expanded Website (still www.ifar.org). The site continues to provide information about IFAR's activities and services, including a comprehensive index to our publications going back to 1979.**

**But now, visitors can experience two new exciting resources:**

- **THE ART LAW & CULTURAL PROPERTY WEBSITE** and
- **THE CATALOGUES RAISONNÉS DATABASES**

### ART LAW & CULTURAL PROPERTY WEBSITE

The Art Law & Cultural Property Website will help users navigate the increasingly large and complex body of legislation and case law relating to the acquisition, ownership, and authenticity of art objects. It has two principal components:

- **International Cultural Property Ownership** and **Export Legislation (ICPOEL)** gathered from close to 100 countries
- **Case Law and Statutes** — summaries of legal cases in IFAR's primary fields of interest.

The site also provides a glossary, images of artworks that figure in the cases, a section on Professional Guidelines, information on contacting foreign government officials, summary overviews of each country's ownership and export legislation, and the full text of key documents — in the original language and also English translation.

IFAR salutes the donors who have made the Art Law & Cultural Property Initiative possible, including the Institute of Museum and Library Services (IMLS), which awarded us a National Leadership Grant; The Peter Jay Sharp Foundation; The Samuel H. Kress Foundation; the National Endowment for the Arts; and the Joukowsky Family Foundation. For a current (but still growing) list, please visit our Website.

### THE CATALOGUES RAISONNÉS DATABASES

This sector unveils two integrated electronic databases — one for published catalogues raisonnés, the other for catalogues in preparation — that can be searched individually or in unison. These unique databases are a gateway to information about catalogues raisonnés — critical tools for researching the provenance and attribution of works of art.

IFAR thanks the donors who have made it possible to produce these bibliographic databases — in particular, The Henry Luce Foundation, which provided a seed grant in 2004; Dedalus Foundation; the Pierre and Tana Matisse Foundation; Robert Lehman Foundation; Florence Gould Foundation; The Pollock-Krasner Foundation; The Gladys Krieble Delmas Foundation; and The Ida and William Rosenthal Foundation.

The Art Law Website and the Catalogues Raisonnés Databases, representing years of research, are major investments for IFAR. Their launch is just a first step. They are, in fact, "living" resources that will continually be expanded and updated.

We invite you to use these new tools, alert us to additional material, and show your appreciation. We are a small non-profit organization, without an endowment, and need and welcome your support.

# What Art Collectors Need to Know About Copyright

THEODORE FEDER*

The claim has frequently been made by some proprietors of works of art in the U.S. (but rarely elsewhere) that ownership of a physical work of art also carries with it ownership of the copyright. This is quite simply a false and misleading assumption.

"The artist retains the copyright *unless he or she specifically signed it away in a written agreement.*"

There have been only two major U.S. federal copyright acts in the twentieth century. The first was passed in 1909; the second was enacted in 1976 and became effective in 1978. Both acts make it clear that the sale or conveyance by the artist of his or her work of art does not carry with it the underlying copyright to the work. The following is the text of Section 27 of the 1909 Copyright Act, which remained in force until succeeded by the second act in 1978:

> The copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not in itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object.

Section 202 of the 1976 Copyright Act (effective January 1, 1978) is equally unequivocal on the subject:

> Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

The impression that the artist forfeits his copyright when he or she sells his work was a short-lived one derived from the finding in the New York State case of *Pushman v. New York Graphic Society Inc.* (1942). A lower New York State court in that case seemed to hold that absent a signed agreement, the artist was presumed to have automatically conveyed the copyright and the rights of reproduction when he sold his work of art. Such at least was the conclusion drawn by a number of owners who sought to control the copyrights to the works in their collections. The clear intent of the 1909 law was that the artist retains the copyright *unless he or she specifically signed it away in a written agreement*. "Pushman" stood for the proposition that the artist automatically loses the copyright *unless he or she retains it through a written agreement.*

Thus "Pushman" contradicted the intent of the 1909 copyright law then in effect, with results which were recognized as so unfair that the New York State Legislature specifically overturned it by legislative action in 1966. The pertinent New York State Business Law provision follows:

> Whenever a work of fine art is sold or otherwise transferred by or on behalf of the artist who created it, or his heirs or personal repre-

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> sentatives, the right of reproduction thereof is reserved to the grantor until it passes into the public domain by act or operation of law unless such right is sooner expressly transferred by an instrument, note or memorandum in writing signed by the owner of the rights conveyed or his duly authorized agent. (Section 224, Article 12-E, 1966 New York General Business Law)

In spite of this negation of the "Pushman" finding, the presumption in the "Pushman" case is still erroneously employed by some to justify the marketing of works in their possession. The result over the years has been the participation of some owners in the poster, greeting card, toy, merchandise, and calendar business, coupled with a refusal to grant artists or their heirs either a royalty or a right to approve the products marketed. This has also served to encourage some manufacturers to ignore the claims of artists whose works they exploit. By and large, however, owners now recognize and respect the rights of creators and their heirs.

Additionally, under the national legislation of Canada, the United Kingdom, France, Germany and virtually every other state in Western Europe, as well as under the provisions of the Berne Convention, to which the U.S. became an adherent on March 1, 1989, there has never been any doubt that the copyright always remains with the artist, but may be conveyed to an owner of the work, only if the artist specifically signs it away in a written document.

**Below are a few common questions about copyright often posed by art owners, together with brief answers, which should clear up some general confusion:**

**Q.** Do art owners need permission to reproduce images of their works for non-commercial purposes, such as in an article about their life/ their collection/ their home, or when publicizing an insurance or theft loss?

**ANSWER:** The non-commercial uses you enumerated do not require the copyright permission of the artist and are treated as Fair Use.

**Q.** As the owner of a 20th century painting not in the public domain, do I need to be concerned about having my living room photographed or reproduced with the painting visible above my sofa?

**ANSWER:** Let us imagine that your living room is shown in *Vogue*. If the painting in question appeared in an overview of the room, there would be no artist authorization or fee required. However, if the painting alone is singled out and shown without reference to its context, permissions and a fee might well be required. Generally, such fees are paid by the magazine.

**Q.** Do I as the owner of a work still in copyright need to worry about reproducing the work on my family's Christmas card (not for sale), or on an invitation to a party or other event?

**ANSWER:** No.

**Q.** Many art collectors allow private group visits to their homes. They distribute illustrated check-lists, or full-size images, of their artworks to facilitate the visit. Is there anything wrong with that from a copyright standpoint? If not, should they — or museums that own artwork, for that matter — be doing anything to protect themselves from potential problems relating to distributing these or other images of their works?

**ANSWER:** There is no problem whatsoever in the situation of house visits, and neither the Artist Rights Society (ARS) nor its member artists involve themselves in such events or the invitations thereto.

There is a separate question as to whether museums have a right to control the images of works they own. In sum, we do not object to museums

claiming copyright to photographs of works in their collections. Please note that such a copyright in a photograph is *separate and distinct* from the artist's copyright in the underlying work.

Museums guard access to works in their collections in part to protect their image rights and the quality of reproduction. Any fees that are charged become a source of needed revenue for the institution, which documents its collection for the ultimate benefit of the public, and particularly for the scholarly community. Increasingly, museums are waiving their fees for scholarly use, a trend begun by the Victoria and Albert Museum.

If an author, however, can obtain a good image of a work that is no longer in copyright from an authorized source, say from a museum that has borrowed it from the institution that owns it, then arguably the work can be reproduced without hindrance or permission. Of course, museums go to great lengths to protect their image rights when lending art works to other institutions.

**Q.** The example you gave of *Pushman v. New York Graphic Society Inc.* is a New York State court decision, which, as you point out, was effectively "overturned" in New York State's 1966 General Business Law. Did any other states have similar decisions and revised laws?

Also, was the legislative overturn retroactive? If not, does this still affect works that were sold in New York State between 1942 and 1966?

**ANSWER:** As the New York case of *Pushman v. New York Graphic Society Inc* (1942) contradicted the 1909 U.S. Copyright Act then in force, it was not emulated in the legislation of other states. However, it is fair to say that collectors and museums in other states were inclined to cite *Pushman* to justify their claims of copyright ownership to works in their collections. Lawyers are divided on whether *Pushman* still applies to works sold in New York State between 1942 and 1966.

**Q.** Can the owner of an artwork (whether a private owner or a museum) legally prevent publication of an image — for example, for a catalogue raisonné, exhibition catalogue, a Website, or an article they don't approve of — if the author/publisher is able to get a decent image without them?

**ANSWER:** In ARS' view, an owner should not withhold the right to reproduce images because he or she disapproves of an author's text. Also, see my answer above regarding museums.

**Q.** What are an owner's rights regarding publishing or promoting an image of a copyrighted work he wants to sell? One doesn't see an artist's or an estate's copyright permission in auction catalogues or in dealers' sales catalogues, or are we just not noticing?

**ANSWER:** Auction houses reproduce proprietors' works within their sales catalogues without the need for artist authorization. This is a Fair Use recognized by ARS. However, the reproduction of a work on the cover of a catalogue, or in an advertisement, does require artist permission and frequently a fee.

**Q.** Could you address the issue of artists who produce works-for-hire? Presumably, in those cases the owner of the artwork, not the artist, has the copyright and all the ancillary rights.

**ANSWER:** Correct. A work-for-hire requires an agreement between the owner-employer and the artist-employee involving a written conveyance of the copyright signed by the artist. In such a case, the owner does acquire the copyright and ancillary rights.

**Q.** Does the previous answer vary by state (if in the U.S.) or by country?

**ANSWER:** Some foreign countries do not recognize the work-for-hire rule and reserve the intellectual property rights to the artist even if the work is a commissioned one.

**Q.** What constitutes "publication" regarding an artwork? Since the publication date of an artwork may affect the copyright term, can you explain what the publication date is? There seems to be some difference of opinion on this point.

More specifically, does exhibition of a work in a gallery or museum, or even the artist's studio, constitute "publication" for copyright purposes? Or, must the work have actually been "reproduced" in a publication, whether a catalogue, press release, newspaper, or gallery press or other materials?

**ANSWER:** In the early part of the twentieth century it was maintained by some that display constituted publication. Such a position served to deprive the artist of his or her copyright and to project the work into the public domain, thus freeing it to be exploited by anyone at will.

Today, reproduction in a catalogue or book would be a recognized form of publication. A press release or critical newspaper article, permitted under Fair Use, would not in and of themselves, in my view, constitute publication for the purposes of the copyright statute. The term of protection for works first published in the U.S. after 1978 is no longer based on the date of publication but on the life of the artist plus 70 years *post-mortem*. Works first published in the U.S. between 1923 and January 1,1978 are protected for 95 years commencing with the date of first U.S. publication.

**Q.** Does the owner of an artwork that is still under copyright have to notify the copyright holder when he sells the work, or otherwise transfers legal title to it?

**ANSWER:** This applies only in the state of California in specified cases. Under the California Resale Royalty Act (Cal. Civil Code Sec 986), a seller, or agent of the seller, is obligated to locate the artist and pay a 5% royalty on sales of "fine art" (defined as an original painting, sculpture, drawing or original work of art in glass that is not permanently attached to real property), provided the value of the sale is more than $1,000 and exceeds the previous sale price of the same work.

The following conditions also apply:

- The seller is a resident of California or the sale takes place in California;
- the artist is a U.S. citizen or has been a California resident for at least two years;
- the sale is not an initial sale of the piece when title is still vested in the artist; and
- the sale is not one by an art dealer to a purchaser when all prior sales within ten years of the initial sale have been strictly between art dealers.

If the artist cannot be found, the seller must deposit the 5% royalty with the California Arts Council, which holds the sum for seven years. If the artist cannot be located or does not come forward during that time, the money reverts to the Council for use in acquiring fine art pursuant to California's Art in Public Buildings program.

**Q.** Can you tell us, briefly, what works are still in copyright based on the 1909 and 1978 U.S. laws? Is it safe to say that works produced by artists who died before 1939 or that were published before 1923 can be assumed to be in the public domain (that is, no longer protected by copyright)?

**ANSWER:** This is a big question requiring a whole other article, which I am willing to supply to you under separate cover.

We will be waiting.

■ ■ ■

LOOKING AT ART: THE CONSERVATOR'S VIEW *

# To See Art or to Save It—A Century of Addressing the Dilemma

MARGARET HOLBEN ELLIS **

### Headlines in the popular press bemoan the sorry physical state of modern artworks. Are today's artworks really falling apart faster than earlier works?

Works of art have always been made from materials that, while intended for artists' use, may or may not be permanent due to their chemistry or physics. While this has gone on since the beginning of time — we see only the artworks that managed to survive, and most of them have undergone significant visual change — problems with artists' materials seem to have accelerated in the nineteenth century, when many new artists' products were introduced. In the twentieth century, artworks began to incorporate substances never intended to be used in the creation of art, a practice that grew out of the Dada and Surrealist rejection of the art object as unique and precious.

### What should we do to lengthen the lifetime of susceptible artworks?

Whether the result of conscious choice, or a by-product of experimentation, the longevity of an artwork can be compromised. Some works of art will inevitably develop conservation problems if precautions are not taken. By precautions, I mean the preventive measures typically taken by museums to slow down the natural process of change that occurs in all organic substances.

### What environmental causes of deterioration can be controlled?

Common agents of physical and chemical change include temperature, air pollution, humidity and light. Museums and galleries generally monitor these conditions to insure that safe levels are maintained.

### In terms of your specialty, works of art on paper, which environmental factor — temperature, air pollution, humidity or light — is most harmful?

Light has a special distinction among these factors, since it is light that allows us to see and enjoy works of art and, at the same time, contributes to their demise — hence the "dilemma of display." Do we choose to See Art or to Save It?

### Aren't some of today's artworks intended to fall apart?

There are certainly works whose disintegration is consciously intended by their creators. Some artists, especially those who do not see their creations as precious commodities, deliberately create their works with deterioration in mind. Dieter Roth and Joseph Beuys, for example, planned for the gradual decay of their food-based works. Nonetheless, works such as these, whose decay is intentional, also need to be considered because, once they enter museum collections and are held in trust for future generations, conservators are often called upon to preserve them.

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* This is the third article in *IFAR Journal's* new series, "Looking at Art," answers and insights from the experts — conservators, connoisseurs, scholars — to a range of questions about caring for and understanding works of art.

** Margaret Holben Ellis is the Eugene Thaw Professor of Paper Conservation, Institute of Fine Arts, New York University and Director of the Thaw Conservation Center, Morgan Library & Museum. She is also a member of IFAR's Art Advisory Council.

**Can you point to any one development that has proven especially problematic in terms of permanence of artists' materials?**

As a specialist in works on paper, I would answer: the development of synthetic dye-based colors such as mauve in the mid-19th century. Until then, an artist's palette consisted of colors derived from minerals, plants, insects and a few animal by-products. While a great deal of effort went into refining products intended for artistic purposes, color chemists were restricted to the technology and substances at hand. Thus, some colors were difficult, if not impossible, to achieve or were prohibitively expensive. But in 1856, an 18-year-old chemistry student named William Perkin discovered a way of making never-before-seen colors easily and cheaply.

While attempting to synthesize quinine for the treatment of malaria, Perkin discovered aniline purple. Instead of quinine, he produced a dark oily sludge that, with further experimentation, was able to dye silk a lovely shade of purple. The color, called mauveine, or mauve, took the fashion houses of London and Paris by storm. Unlocking the chemistry of mauve quickly led to other new colors — crimsons, blues and greens — and earned their inventor a fortune, but its importance extended far beyond fashion. Within a decade, Perkin's dyes were being used as artists' colorants.

Almost as quickly, however, disquiet arose over how swiftly the new colors faded. In 1877, Joseph Sidebotham, an amateur botanist, entomologist, astronomer and photographer, voiced his concerns in a letter to the Manchester Literary and Philosophical Society. He had observed that aniline colors were being used increasingly for tinting photographs and had discovered that "they are being *extensively* used in paintings and water-colour drawings, and the colours regularly sold for that purpose. Anyone who knows the speedy alteration by light of nearly all of these colours will protest against their use, and a statement of this… would probably have the effect of causing them to be discontinued by all artists who care to think that their works should last more than a single year."[1]

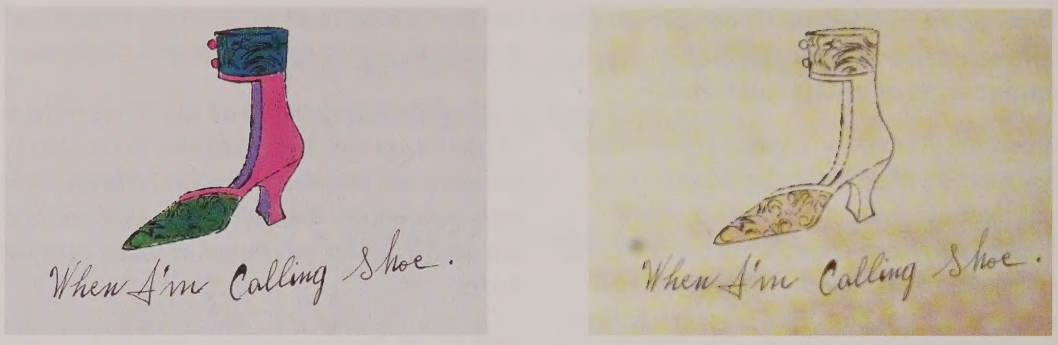
It should be noted that these are the same types of dye-based inks that would shortly be used in the air brush, invented in 1882 in America. These were also virtually the same dye-based colors that are used in the ink-jet printers of today, invented in 1976.

By the 20th century, synthetic dyes of the sort invented by Perkin and their derivatives, the azo dyes, were incorporated into virtually all media used to create works of art: oil paints, acrylics, wax crayons, ballpoint pens, colored pencils, writing, drawing and stamping inks, pastels, watercolors, and even in the paper itself ("paper stainers" being mentioned as early consumers of the new dyes).

Synthetic dyes were also used in gouache, whose range of colors grew exponentially in the late 19th century. Linel is one popular brand of gouache still manufactured today by Lefranc et Bourgeois. A favorite medium of Henri Matisse, Linel gouache was used to coat the large sheets of paper the artist used to make his cutouts. Today, many collage elements in his cutouts have changed drastically. Deep purples, for example, have faded to dull pinkish beige and magentas to pale pink.

In 1947, the artist decided to make prints after a series of cutouts called *Jazz*. Unhappily, the brilliancy of the Linel colors, for which Matisse claimed he needed to wear sunglasses, could not be replicated with an oil-based printing ink. For that reason, Linel gouache was used with the pochoir stenciling technique to produce the *Jazz* prints. In studying a lightfastness chart published by Linel, several of the colors most liable to fade quickly correspond to those in the *Jazz* series, a foreboding observation, especially given the current craze for displaying these prints as colorful decoration.

[1] Sidebotham, Joseph, "Scientific Notes," *The Journal of Science*, # 54, April 1877, p. 287.




**FIGURES 1A & B.** ANDY WARHOL, *When I'm Calling Shoe,* 1955. Offset lithograph and watercolor on paper. 9 3/4" x 13 3/4". At left, the unfaded work. At right, the work after prolonged home display in full daylight. © 2009 Andy Warhol Foundation for the Visual Arts / Artists Rights Society (ARS), New York. Photo: The Andy Warhol Foundation for the Visual Arts / Art Resource, NY.

### Returning to environmental factors, how can damage from light be prevented or at least slowed down?

Damage from light can be drastic and irreversible. Most museums monitor the environment in which their collections are displayed and impose restrictions on the type and amount of light in the galleries, and on the length of the exhibition. When it comes to lessening the harmful effects of light, three factors are considered:

The first, and the most easily controlled, is the type of light. Where does it come from? What sort of lamp produces it?

While all light is dangerous, certain wavelengths, or types, of light are more harmful to paper and colorants than others. Most of us are familiar with the spectrum of radiant energy or light produced by the biggest lamp of all — the sun. Generally, as the wavelength decreases, photochemical degradation increases. This is particularly true in the region below 500 manometers (nm); that is, the portion that approaches and includes the ultraviolet end of the spectrum. Since the human eye begins to perceive light only at around 400 nanometers, radiant energy below that limit serves no practical function and can be filtered out in order to reduce deterioration.

Ultraviolet (UV) light is found in high proportions of daylight and in slightly smaller amounts in fluorescent lighting. Incandescent (tungsten) light bulbs do not produce appreciable amounts of UV light. Tungsten halogen lights, currently in favor in museums and galleries, contain more UV light. The rule of thumb is, the bluer the light or cooler the light, the more UV it contains. The recently introduced energy efficient bulbs or CFLs (Compact Fluorescent Lamps) can be quite blue, but their color temperature is improving, not for the sake of artworks, but because people generally prefer warmer light.

Methods of removing UV light from rooms where works of art on paper are exhibited are straightforward. Physically blocking out all daylight with curtains, removing fluorescent tubes and substituting incandescent light is one logical way. Filtration is another method. In most museums exterior windows and skylights have been treated with UV-filtering film applied directly to the glass. UV-filtering acrylic or optically coated glass can be used in place of normal glass in frames.

### What if we just lowered the light?

The intensity of light is another factor to be considered when displaying light-sensitive materials. In the U.S., light intensity is usually measured in foot-candles; in Europe, it is measured in lux units. The safest level of illumination for vulnerable works has been much debated. When the alarming possibility that watercolors faded when exposed

[2] Russell, W. J. and W. de W. Abney, *Report to the Science and Art Department of the Committee of Council on Education on the Action of Light on Water Colours.* London: Eyre and Spottiswoode, 1888, p. 14.

**FIGURES 2A & B.** ANDY WARHOL, *Sunset and Evening Shoe,* 1955. Offset lithograph/watercolor and pen on paper. 9 3/4" x 13 3/4". At left, the unfaded work. At right, the work after prolonged home display in full daylight. © 2009 Andy Warhol Foundation for the Visual Arts / Artists Rights Society (ARS), New York. Photo: The Andy Warhol Foundation for the Visual Arts / Art Resource, NY.

to light was first brought up in the 19th century, many felt that this could not possibly occur in the confines of dimly lit Victorian parlors, a misconception debunked by Dr. Russell and Captain Abney in their landmark publication, *The Action of Light on Water Colours* of 1888.[2] It is generally agreed that five to eight foot-candles of artificial light is acceptable. This figure represents an uneasy compromise between the desire to exhibit an artwork and the ability to see it. The exact level represents the lowest level of light under which the human eye can differentiate colors. As we grow older we need more light to discern subtle color shifts. This has led some to demand that light levels be raised for special senior citizens days at museums.

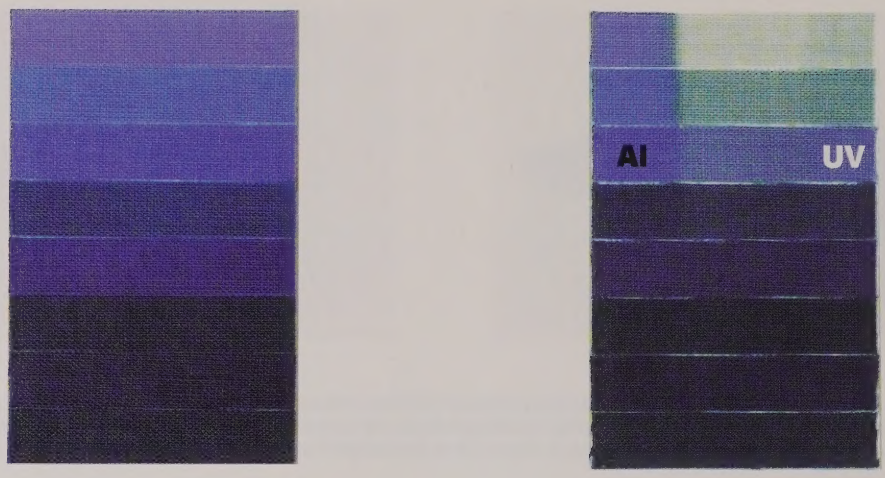
## Why is my favorite Turner watercolor at the Tate rarely on view even under these "safe" conditions?

The third and most difficult factor to control is exposure time. As already mentioned, and as has been known for over a century, some media fade from exposure to light (**FIGS. 1A&B** and **2A&B**). Moreover, light damage is cumulative — each day, each week, each month that light-sensitive works of art are displayed results in more deterioration. Putting artworks in the dark does not rejuvenate them or give them a rest.

Rather than arbitrarily restricting the display of all works on paper, a means of calculating exposure times appropriate to the work's materials has been devised. Depending on its medium and type of paper support, each work is assigned a light-sensitivity ranking that represents its vulnerability to light relative to other artworks. The category corresponds to the British Blue Wool or International Standards Organization (ISO) standards, a set of eight dyed wool strips that will fade at a pre-determined rate when subjected to a high intensity light for a period of time (**FIGS. 3A&B**). Each numbered strip requires twice the exposure to exhibit the same degree of fading as the one before it.

By comparing the fading rates of certain artist's materials, we can correlate the fading of certain colors with the fading of Blue Wool Number One. Thus, a watercolor containing these colors would be classified as Category One and receive the least exposure at the lowest light levels.

Finally, we calculate how much light, measured in lux hours, an artwork can receive before its First Noticeable Fade. For example, a drawing done in felt tip marker or a watercolor by Turner should receive no more than 10,000 lux hours per year of exhibition. Those in charge of making exhibition decisions would have the option of showing these artworks at 50 lux, a typical light level, for eight hours a day for 25 days per year, or at 10 times that amount of light for only 25 hours a year — a very short show indeed. This would prevent the first noticeable fade in 100 years, the benchmark used in many museums. Particularly precious,




**FIGURES 3A & B.** British Blue Wool Standard (BWS), a set of 8 dyed wool strips that fade at a predetermined rate. **3A** (left) shows the strips before exposure. **3B** (right) shows a lengthwise section protected by aluminum foil (Al, on the left) and another protected with an ultraviolet filter (UV, on the right). The most faded length, in the center, was unprotected and exposed to window light for 8 months. Photos: Copyright © Canadian Museum of Nature. All rights reserved.

light-sensitive or already overexposed items could be given a Zero Tolerance level — that is, their first noticeable fade will only take place in one thousand years.

**What about our fondness for things that look aged — the golden glow or patina of time. Don't artworks incorporating unstable media acquire their own "golden glow?"**

According to John Ruskin, yes. 130 years ago, when faced with the grim reality that his precious Turner watercolors had significantly faded, Ruskin plaintively claimed that they were "even in their partial ruin marvellous" and clung to the belief that their "colours... changed so harmoniously that I find in their faintness more to discover through mystery than to surrender as lost."[3] In reality, however, all colors do not fade similarly, due to their differing sensitivities to light. We have become accustomed to 18th century pastel portraits of young women with a deathly pallor because their carmine-colored cheeks have vanished, or to Currier and Ives prints, whose green trees have shifted to blue due to the fading of yellow gamboge. Regardless, I think we would all prefer the original color balance, not to mention the lively reflectance created by white paper, but not by paper darkened by overexposure to light.

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[3] John Ruskin, *Notes by Mr. Ruskin on his Collection of Drawings by the Late J.M.W. Turner, RA.* (London: The Fine Art Society, 1878).

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# THE WHO, WHAT, WHY AND HOW OF THE CULTURAL PROPERTY ADVISORY COMMITTEE (CPAC)

## AN *IFAR EVENING*, APRIL 17, 2008

The five speakers, left to right: Jay Kislak, Patty Gerstenblith, Nancy Wilkie, Kate Fitz Gibbon, and Jack Josephson.

**EDITOR'S NOTE:** *The following are edited versions of five talks and the Q&A from an IFAR Evening on the Cultural Property Advisory Committee (CPAC), held at the National Academy in New York on April 17, 2008. A sixth speaker, Martin Sullivan, Director of the National Portrait Gallery and a former Chairman of CPAC, was unable to participate.*

## INTRODUCTION

### SHARON FLESCHER*

The Cultural Property Advisory Committee (CPAC), housed in the State Department, is responsible for reviewing requests by foreign governments to restrict the importation into the U.S. of cultural property deemed to be "in jeopardy from pillage," and then recommending a course of action to the President or his delegated decision-maker in the State Department. If the request goes forward, it results in a temporary bilateral agreement with that country.

It is not an exaggeration to say that the activities of CPAC are not well understood and have at times been controversial. IFAR organized the following program with the intention of shedding even-handed light on the decision-making and appointment process of the Committee.

IFAR has long been interested in this subject. As early as 1980, when the U.S. Congress was debating the implementing legislation that created CPAC, IFAR organized a two-day symposium to air the issues, and then published the proceedings.

The debate over the implementing legislation that followed U.S. ratification of the 1970 UNESCO Convention lasted for 10 years and was very contentious. It resulted in compromise legislation, the 1983 Cultural Property Implementation Act (CPIA), which, in turn, created the Cultural Property Advisory Committee. It is sometimes forgotten that the UNESCO Convention was not self-executing and that the U.S. ratified it with "reservations," embodied in the CPIA. This set out the mechanisms and principles by which we

* Sharon Flescher, Ph. D., is Executive Director of IFAR and Editor-in-Chief of the *IFAR Journal*.

would implement those aspects of the Convention that Congress felt were appropriate for the U.S. A key component was the establishment of a Committee representing different constituencies to review the requests from foreign countries.

IFAR has continued to follow issues related to the CPIA and CPAC. In 2005, for example, we devoted an *IFAR Journal* to the request from China, still pending at the time of this *IFAR Evening* (but approved in January 2009), for U.S. import restrictions. True to form, the *Journal* published arguments both for and against the restrictions.

We had long wanted to host a program specifically on CPAC. IFAR's own Chairman, Jack Josephson, was Chairman of CPAC from 1990-1995. But it was not until I met Jay Kislak, then Chairman of CPAC, at a cultural property conference in the fall of 2007 and he agreed to participate, that the stars were in alignment.

In organizing the *IFAR Evening,* IFAR took the controversies surrounding CPAC into account. We tried to organize a stimulating and balanced evening — representing different constituencies and views — with the one requisite that all of the participants be current or former Committee members. This meant, of course, that they might be precluded from discussing certain subjects. Unfortunately, one announced participant, Martin E. Sullivan, Chairman of CPAC from 1995 – 2003 and a representative of the museum community, was unable to participate at the last moment. Thus the museum perspective is missing from the following talks.

It is important to add that we invited Maria Kouroupas, the State Department Staff Executive Director of CPAC, to participate in our program, and even delayed its scheduling in the hope that she would. But in the end, she was unable to.

In sequence, the following articles (talks) are by:

Dr. Patty Gerstenblith, Distinguished Research Professor at the DePaul University College of Law and director of its Center for Art, Museum and Cultural Heritage Law. She was a CPAC member from 2000-2003. Dr. Gerstenblith discusses the legal underpinings of CPAC.

Next is Nancy C. Wilkie, the William Laird Professor of Classics, Anthropology, and the Liberal Arts, and Director of Archaeology, at Carleton College, Minnesota; and former President of the Archaeological Institute of America. Dr. Wilkie, who is in her second term as a member of CPAC (2003 – ), focuses on the composition of CPAC and the appointment process.

Following Dr. Wilkie is Jack A. Josephson, Chairman of CPAC from 1990-95, who provides some historical background to CPAC. Mr. Josephson is an Egyptologist; Distinguished Visiting Professor at the American University of Cairo; and, not incidentally, IFAR's Chairman.

Kate Fitz Gibbon, Co-editor and contributing author to *Who Owns the Past?,* an anthology of cultural property papers, offers a critique of CPAC. Ms. Fitz Gibbon, a specialist in Central Asian art, is an attorney and was a CPAC member from 2000 – 2003, as an "expert in the international sale of cultural property."

Last is Jay I. Kislak, CEO of Kislak Realty Inc.; head of the Kislak Foundation in Miami, Florida; and a collector of manuscripts and the art of the early Americas. Mr. Kislak's collection of nearly 3,000 items was donated to the Library of Congress and opened in November 2007. He was Chairman of CPAC at the time of the IFAR program (2003 – 2008), and he provides the Chairman's perspective.

■ ■ ■

# The Legal Basis

PATTY GERSTENBLITH*

My task is to give the legal background to the Cultural Property Implementation Act. To do that, I will back up and discuss the 1970 UNESCO Convention. The Convention was enacted, among other reasons, because of the large-scale looting of archaeological sites throughout the world. **FIGURE 1** shows a burial mound in Turkey after a bulldozer has gone through the center. We see another part of the world in **FIGURE 2**, Iraq, which shows a site in southern Iraq that has been looted over the last few years. It shows the difference between the areas excavated by archaeologists and then, around the edges and far into the distance, the looters' pits.

The importance of stratigraphic context for archaeological sites goes back well into the 19th century. **FIGURE 3** is a *very* schematic early drawing of a site in the Negev in Southern Israel, the site of Tell el-Hesi. It was drawn about a hundred years ago and is *very* rudimentary by modern standards, but it shows that the layers of the site, each representing different time periods, would have associated architecture, objects, fauna and flora remains, and other indications of past life. Most people understand the importance of proper excavation and retrieval of information about the past. When a site is looted, that information is lost. Following WWII, particularly in the 1950's and the 1960's, the looting of sites picked up, exemplified by the hacking apart of Maya *stelae* such as this one **(FIG. 4)** in Honduras. Stelae, monumental sculptures, were hacked into pieces so that they could be transported across the border and brought into the U.S.

These acts, among other things, prompted the promulgation of the 1970 UNESCO Convention.[1] For our purposes, the most important part of the

**FIGURE 1. Bulldozed tumuli. Dibektepe, Bin Tepe, Western Turkey. Photo courtesy of the Central Lydia Archaeological Survey.**

* Patty Gerstenblith, Ph.D., J.D., is Distinguished Research Professor at the DePaul University College of Law and director of its Center for Art, Museum and Cultural Heritage Law. She is founding president of the Lawyers' Committee for Cultural Heritage Preservation and Co-Vice Chair of the International Arts and Cultural Property Committee of the ABA Section on International Law. She was a member of CPAC from 2000 to 2003.

1 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 17 November 1970.

**FIGURE 2.** Aerial view of Umm al-Aqarib (southern Iraq). Photo courtesy of the Italian Carabinieri, Republic of Italy.

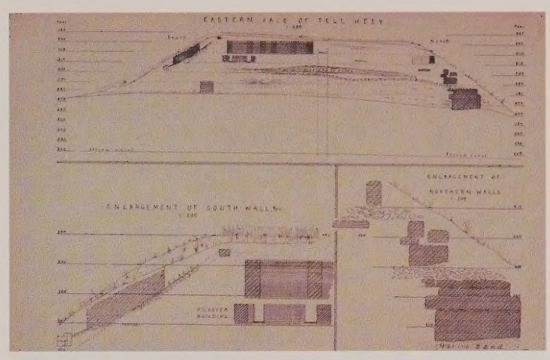

**FIGURE 3.** Cross-section through the site of Tell el-Hesi by Sir Flinders Petrie.

Convention is Article 9, which calls on Member States to assist in cases of pillage of archaeological and ethnological objects. Article 9 refers in particular to what I call "undocumented artifacts." These are artifacts that are not known and not recorded, because they were stolen or illegally removed, including by the looting of archaeological sites, before they are recorded. Typically, we find out about them when they appear on the market or when they cross international boundaries. In 1983, the U.S. Convention on Cultural Property Implementation Act — called the CPIA — came into effect. The Senate Report that accompanied enactment of the CPIA explicitly acknowledged:

1. the irremediable destruction of archaeological sites;
2. that the enactment of the CPIA is important to U.S. foreign relations, including our international cultural relations; and
3. that the interest of the U.S. extends beyond our import market.

The Senate report also referred to the importance of U.S. Native American sites that were being looted at that time — and still are today.

The Cultural Property Advisory Committee (CPAC) has eleven members — three archaeologists or anthropologists; three people expert in international sales; two representatives of museums; and three representatives of the general public. CPAC only makes *recommendations;* it does not make *decisions.* It makes the recommendations to the delegated decision-maker, who is a State Department official in the Bureau of Educational and Cultural Affairs. This is the person to whom the President of the United States has delegated his authority to make determinations as to whether to impose import restrictions.

An exception later in the statute "states that the U.S. can impose import restrictions even if another country with a significant import trade does not, *so long as* the U.S. restrictions will be of substantial benefit in deterring the situation of pillage."

The statutory sections that we were talking about before — there are many different numbering systems; some people call these sections 303 and 304, but the proper legal citation is 19 USC sections 2602 and 2603 — allow the President, or the delegated decision-maker, to impose import restrictions upon request by another State Party, that is, by another country that is party to the UNESCO Convention. The import restrictions are applied to designated categories of archaeological and ethnological materials. This can be done in one of two ways. The first is through a bilateral agreement negotiated between the U.S. and the other country. Sometimes these are called Memoranda of Understanding or MOU's. The second is by the U.S. alone, through what is called an emergency action.

**FIGURE 4.** Maya Stela showing King "18 Rabbit", Copan, Honduras

The process begins with the other country, the other State Party to the Convention, making a request to the U.S. for the import restrictions. That request goes before the Cultural Property Advisory Committee, which then makes a recommendation concerning what we refer to as the "four determinations" (which, obviously, I've shortened from the statute itself):

1. First is whether the cultural patrimony of the country is in jeopardy of pillage;
2. Second is whether the State Party, in other words, the requesting country, has taken *internal* measures consistent with the UNESCO Convention to protect its own cultural patrimony;
3. Third, and probably one of the more contentious aspects, is whether the U.S. restrictions will be taken in concert with measures taken by other nations that also have a significant import trade in the particular category of objects. There is an exception to this later in the statute which states that the U.S. can impose import restrictions even if another country with a significant import trade does not, *so long as* the U.S. restrictions will be of substantial benefit in deterring the situation of pillage.
4. The fourth requirement, or determination, is whether the import restrictions are in the interest of achieving cultural interchange for scientific and educational purposes.

There isn't time to speak much about emergency actions — just to note that the foreign country first has to make a request for a bilateral agreement. A country cannot just ask for an emergency action. The U.S. statute defines three types of emergency situations, so the requirements are completely different from those for a bilateral agreement, but the process has to *start* with a request for a bilateral agreement. So if CPAC recommends, and the decision-maker decides, that an emergency situation exists, import restrictions can be imposed under an emergency action. Restrictions under an emergency action can only last five years initially and can only be renewed one time for an additional period of three years. So emergency actions last a maximum of eight years. The bilateral agreements last five years initially, but they can be renewed an indefinite number of times.

The U.S. State Department Website has a very handy chart[2] that lists all the countries with which the U.S. has had either emergency actions or bilateral agreements under the CPIA. It gives the date when the restriction started and whether it has been renewed. El Salvador was the first country. It started with an emergency action on a relatively narrow category of Pre-Columbian material. This turned into a bilateral agreement or MOU, which has been renewed several times. So there have been import restrictions on El Salvadoran material going back as far as 1987.

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[2] See http//culturalheritage.state.gov/chart.html. [Editor's Note: The State Department site is undergoing revisions. The CPIA chart has not been updated since 2007.]

The chart links to the Federal Register Notice that gives the full content of the agreement and also the "Designated List." It is important to remember that these import restrictions apply to designated categories of material. The State Department Website has an image database showing the different "types" of objects that are restricted, not "actual" looted objects. So in case someone doesn't know what a "Pre-classic figurine" from El Salvador looks like, he or she can go to the Website and find out. This is extremely important for lawyers who work in the import/export field, and who tend not to understand or know what these objects look like. The image database gives a thumbnail image and additional information about the objects that are subject to import restriction. It is important to remember that it is a *restriction,* not a ban. There are still ways in which these objects may be able to come to the U.S.:

1. If they left the country of origin before the import restriction went into effect.
2. If they have an export license.

Many of these countries will not give export licenses for permanent export but will give licenses for temporary export for study or exhibition purposes.

To spark conversation for later, I will end by saying that last summer, for the first time, when the bilateral agreement with Cyprus was renewed, coins were included as one of the designated categories of materials.

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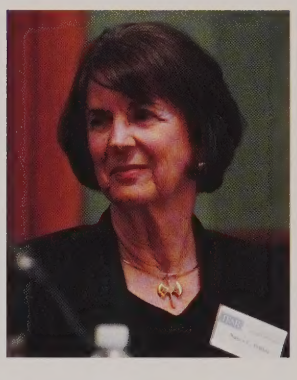
*CPAC section continues*

# The Composition and Operation of CPAC

NANCY C. WILKIE*

Who are the members of CPAC? What are their qualifications for serving on the committee? How do they get appointed? Under the terms of the Convention on Cultural Property Implementation Act (CPIA), CPAC is composed of experts and professionals who advise the President of the United States regarding requests from foreign countries for restrictions on the import of their archaeological and ethnological material. The eleven members of the Committee are appointed by the President for 3-year terms. Members may be reappointed for one or more terms, and they may continue to serve until reappointed or until a successor is named. The President designates the Chairman of the Committee.



"How do you become a member of the Committee? . . . You can actually apply to the Presidential Personnel Office by means of the White House Website."

The CPIA stipulates that representation on the Committee should be as follows:

1. two members should represent the interests of museums
2. three must be expert in archaeology, anthropology, ethnology or related fields
3. three must be expert in the international sale of cultural property; and
4. three represent the interests of the general public

If ambiguity exists in any of these categories, it is in the last one — the three members of the general public — because, historically, they have represented a wide variety of views about ancient art and the looting of archaeological materials.

How do you become a member of the Committee? If you know that there is an opening or that one will be coming up — and you can actually tell that by the date that a member has been appointed — you can actually apply to the Presidential Personnel Office by means of the White House Website.

The application must include the names of three references. Since these are political appointments, references from individuals who are active in politics are useful. The President makes the appointments, which do not require Senate confirmation.

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* Nancy Wilkie is William H. Laird Professor of Classics, Anthropology and the Liberal Arts, Carleton College; Former President, Archaeological Institute of America; and a CPAC Member from 2003 to the present.

The State Department requires that members of the Cultural Property Advisory Committee have government security clearance. Therefore, individuals being considered for appointment to the Committee must fill out a National Security Questionnaire; they must be fingerprinted; they must file a Credit Release Form allowing the State Department to obtain one or more consumer/credit reports; and they must submit proof of U.S. citizenship. Once appointed, members must file a Confidential Financial Disclosure Report. So, you must be willing to submit yourself to a great deal of scrutiny in order to become a member of the Committee.

Once appointed, members of the Committee are prohibited from soliciting, accepting or receiving partisan political contributions and from running for partisan political office. They also are barred from otherwise engaging in political activities both while on duty and on many off-duty occasions as well. Thus, they may not serve as delegates to a political party convention, host or speak at a partisan rally, endorse or oppose a candidate for partisan political office, or work on a partisan political campaign.

Members of the Committee must recuse themselves from any matters under consideration by the Committee that would have a "direct and predictable effect" on their financial interests, "unless [they] first obtain a written waiver." The potential for conflict of interest is inherent in the Committee since all members have been appointed because of their expertise. So, for example, a Committee member may be a dealer or collector of materials from a country whose request is under review. Because that person is able to bring expertise and knowledge about the trade in antiquities or ethnological material from that part of the world, it would not serve the Committee well to exclude him or her from the discussion. In this case, consultations are undertaken with legal counsel to the Committee to determine whether or not the Committee member is able to participate in the review of that particular request. This issue has come up on more than one occasion since I have been a member of the Committee, and in all instances it was resolved satisfactorily by legal counsel.

The Committee convenes only when a request is received through diplomatic channels from any of the 115 State Parties [as of June 2008, there are 116] to the 1970 UNESCO Convention asking for U.S. assistance under Article 9 of the Convention. Six members of the eleven are required for a quorum.

Requests from foreign governments are only for Memoranda of Understanding [MOUs], not for emergency actions, which the Committee also can recommend if it deems the situation warrants it. When there is a request for a MOU, the Committee meets either to give its advice about whether the U.S. should enter into a MOU with the foreign country or whether it should renew an existing MOU. The Committee also meets to review all MOUs about halfway through the five-year period during which the MOU is in effect. Committee members raise questions about the effectiveness of the MOU, about the actions that the country with whom the U.S. has entered into a MOU have taken to protect their antiquities and stop the illicit trade, and actions taken by the U.S. to implement the provisions of the MOU. At this time the Committee also can request that certain additional information be obtained if there is a request for a renewal of the MOU.

Information about the foreign government's request is transmitted to the Committee by the State Department. The Committee may review additional documentation not contained in the request and it *may* hold public hearings. Written comments from the public regarding the request must be submitted to the Cultural Property office at least four working days in advance of the meeting so that they can be disseminated to the committee members. Those persons wishing to make oral presentations at an open session must submit a copy of their written text. All documents

submitted to the Committee will become a part of the record of the meeting and will be transmitted to the appropriate State Department officials.

Oral presentations will be limited to 5 minutes. Additional time will be allowed for interchange with Committee members at the Chair's discretion. We ask that presenters not *read* their submitted remarks; rather, we request that they summarize their written remarks and bring any new information that they would like to add. Members of the Committee may also take this opportunity to ask questions of those who have come to testify either on behalf of or in opposition to the renewal or initial entering into of the MOU.

After the Committee reviews the information provided in the requests, it recommends a course of action to the U.S. State Department, where the President's decision-making responsibilities under the Convention on Cultural Property Implementation Act reside.

The Cultural Property Advisory Committee's work ends once we have made our recommendation to the decision-maker. We are no longer part of the discussion. If the final decision calls for an agreement, the State Department leads the negotiation. If the final decision calls for emergency import restrictions, the U.S. Customs Service takes immediate action.

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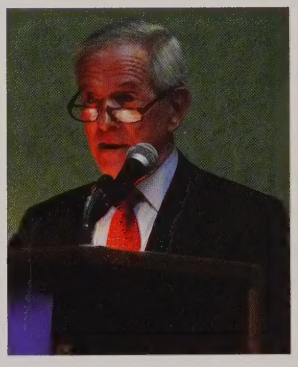
## A Historical Perspective

JACK A. JOSEPHSON*

In order to introduce a bit of historical perspective into this discussion, I would like to talk briefly about the origins of the art trade and looting. Both are documented for at least 5,000 years.

Early dynastic royal tombs datable to 3000 BC or earlier in Abydos, Egypt contain artistic wares imported from Mesopotamia and Palestine. The Egyptians themselves invaded and robbed elite tombs, perhaps within days of the burial. Later, the Babylonians seized Elamite religious statuary of great beauty and significance as evidenced by the appearance of a statuette (the *Guennol Lioness*), recently sold at Sotheby's, of a lion-headed god or goddess discovered near modern Baghdad, hundreds of kilometers distant from its original location in southern Iran. The Romans were probably the most egregious ancient looters. Pillaging continued into modern



times with the Nazis, and later the Soviet Union, stealing the contents of entire museums as well as private collections. Just a few years ago, in 2003, the Baghdad Museum was plundered literally in front of American soldiers. Nor can we forget the wanton destruction by the Taliban in Afghanistan.

Shortly after the end of WWII, the U.N. was established and shortly thereafter UNESCO, its cultural and scientific arm. Probably because much of its

* Jack A. Josephson, an Egyptologist, is Chairman of IFAR and was Chair of CPAC from 1990–1995.

membership were victims of cultural pillage, a debate about controlling this practice culminated in the adoption of the 1970 UNESCO Convention calling for the protection of cultural property and requesting all U.N. members to subscribe to it. The U.S. signed the Convention in 1972, but without the legal means of enforcing it.

"Unfortunately, rarely has Committee membership been in conformity with the Act. During my experience on the Committee, this was not the only part of the . . . CPIA that was disregarded."

The debate on how the U.S. should enforce embargoes of cultural property lasted 10 years. The opposing sides were principally archaeologists versus museums, collectors and dealers. Clearly, Senators Moynihan and Dole, the bill's sponsors, tried to make regulation even-handed for the two factions, or perhaps a little tilted to the latter group. This is clear from the make up of the Cultural Property Advisory Committee which, by the terms of the law, is to consist of two members representing the interests of museums, three experts in the fields of archaeology, anthropology, or ethnology, three dealers, and three representing the interest of the general public. There can be little doubt about the sympathies of the framers of this law, who did not wish for unfair or blanket embargoes. Unfortunately, rarely has Committee membership been in conformity with the Act.

During my experience on the Committee, this was not the only part of the Convention on Cultural Property Implementation Act (CPIA) that was disregarded. The law is very specific on the requirement that public diplomacy by the State Department must be invoked in order to prevent the dispersal of embargoed cultural property to markets in other countries, thereby simply transferring sales overseas. I never saw this happen, or it was not reported to the Committee. The Act also required proof that the U.S. was a principal market for the material in question. This important and necessary question was only cursorily touched on during the deliberations I was part of.

In the period of my chairmanship in 1992, the Committee published a 10-year report to the Congress. In so doing, we enlisted many interested parties including the head of U.S. Customs, experts in the area of conservation of historic sites and monuments, including many art rich countries, museum people, collectors, and anyone we thought might offer informed opinions. The report called for the greater use of diplomacy in an effort to aid art rich states to preserve their cultural property. To the best of my knowledge, it was largely disregarded.

Due to what Senator Moynihan perceived as weaknesses in the manner in which the CPIA was used, he and Senator Schumer, both senators from New York, proposed amendments aimed at returning the Act to what was originally intended. They were unsuccessful in their efforts. I don't question the need to protect cultural patrimony and believe the CPIA and its advisory committee are a necessary and important part of efforts to do so. However, I urge a more comprehensive program — part of which first appeared in our 1992 recommendations; that is, to assist states, both here and abroad, to make a greater commitment to conserve and protect monuments from an increasingly hostile ecology and escalating population and to put in place more effective policing to control and eliminate looting. These actions, together with stronger diplomatic efforts, would help make cultural preservation a reality. I also believe that archaeologists should become more restrictive in excavating sites. Modern non-invasive methods of determining what lies under the ground are readily available and do not expose fragile remains to disasters of all kinds.

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# A Critique of CPAC

KATE FITZ GIBBON*

I have been assigned `the unenviable job of discussing in just a few minutes everything that I saw as difficult, conflicted, or wrong with the Committee process. So, I will raise some issues that caused the most conflict in the Committee. The country requests are pretty straightforward. The difficult discussions have to do with the sufficiency of the request and, therefore, with our reading of the law. I should say that we talk about standards and thresholds in the law — except it would be more accurate to say that we go looking for ways to meet those standards and thresholds. One threshold determination is whether there is jeopardy to a country's cultural patrimony. Does that mean damage focused on one kind of art or period, to which import restrictions should be applied? Or does it mean a country's entire cultural heritage should be encompassed in an import restriction? The committee reaches automatically for the broadest restriction.

As part of its determinations, the Committee measures meaningful self-help by the requesting country. There has been much debate as to what that means. Does it mean a law vesting ownership of all cultural property in the State? Is it building a museum? Posting guards at archaeological sites? Or just putting up a sign at an airport? Sometimes the Committee has trouble "decoding" what it means to "act in concert with other nations." If another market nation has signed the UNESCO Convention, is that enough? The committee finds self-help in the smallest act by the source country.

> "Too many times, where Congress intended the Committee to use a scalpel, it has used a club instead."

Often the question is, what is cultural patrimony? Some members think it is a subset of special objects with special meaning to a country's history or religion; or something that is the high point of art or simply touches a nation's heart. Others think that it is everything — from coins to potsherds. Ancient coins from Cyprus have recently become the subject of embargo through the efforts of the Committee. One of the difficulties in placing an embargo based on the origin of materials, however, is that ancient coins were circulated in the many millions throughout the ancient world and are very often unidentifiable as to the place of origin. The committee is not much interested in the difficulties in ascribing a place of origin to widely circulated objects.

The law asks, will general import restrictions further the general interest of the international

* Kate Fitz Gibbon is an attorney practicing art law in New Mexico, a specialist on Central Asian art, and a former gallerist. She was a member of CPAC from 2000 to 2003.

community in cultural exchange? Is this an automatic "yes"? Or does the example of coins indicate that they might thwart it?

Unfortunately, no one on this panel is able to stand up for the museums.[1] It was my experience on the Committee, where I was the only trade representative and there were two museum representatives, that the museum's mission — to exhibit, study and preserve the art of all nations for the benefit of humanity and the essential role that acquisitions and donations play in furthering that mission — were not of significant concern to many members on the Committee. It may appear to you, from what I am saying, that what we did at the Committee was re-argue what had been argued in Congress years before. And you would not be so far wrong. Why do we remake the law with every request that comes before the Committee? I am not sure the Congress intended us to be so "helpful."

The Cultural Property Implementation Act is a very good, very sensible law as far as it goes, and we ought to be capable of a reasonable interpretation. The problem is that different factions on the Committee have read the words of the law very differently. In many instances, from my "plain reading," the Committee has substantively altered Congressional intent. Import restrictions in real crisis situations will have broad support, not only on the Committee but domestically and globally, from every faction of the art world. Placing dubious constructions on the law and imposing blanket embargoes will not. Too many times, where Congress intended the Committee to use a scalpel, it has used a club instead. Both the patient and the will of the doctors have suffered damage as a result.

The secrecy under which the Committee operates harms it, as does the lack of transparency, the absence of Congressional oversight and of any kind of a corporate memory among the Committee members. At my first meeting, which was a renewal meeting, we were not supplied with either the country's request or the Committee's recommendation from the previous granting of import restrictions. I asked for it, and we were given it, but it astounded me that the information was not part of the process. I am also shocked that repeated Freedom of Information Acts and requests for information have gone unanswered in recent years. How can the public give testimony if they don't know what's at issue? We rely on an informed public to make arguments for and against proposed restrictions, to illuminate our discussions by bringing specialist knowledge to the table. No committee, no matter how broad, can cover all the global issues, and it is counterproductive to the extreme to deny public access to the requests. It ill serves the reputation of the Committee when the source of a country's request is obscured or hidden.

"The secrecy under which the Committee operates harms it, as does the lack of transparency, the absence of Congressional oversight and of any kind of a corporate memory among the Committee members."

There are larger arguments that go in many ways beyond the capacity of the Committee under the law. Jack Josephson mentioned a few. But the Committee needs to be mindful of these arguments as well. Congress gave the Committee only one tool: embargo. Embargo by itself is the equivalent of "zero tolerance" or "just say no" or "choose abstinence," and it is about as effective. When the only tool that you have is a blanket one like embargo, it can be used in ways that do more harm than good.

[1] Martin Sullivan, Director of the National Portrait Gallery and former Chairman of CPAC, was going to speak for museums but had to cancel (see Editor's Note and Introduction).

Most requesting countries are desperately poor — they need help in building local museums and educational programs. They need assistance in documenting what they own so that if it is stolen they know what they are missing. The Cultural Property Implementation Act was not set up to establish such programs. However, we are enjoined to make recommendations for actions that will further the preservation of cultural heritage. Such recommendations would be more likely to be acted upon if they did not disappear into some filing cabinet at the end of a meeting, never to be seen again. There is terrible archaeological loss when sites are looted. The loss is the same when a massive hydroelectric project inundates twelve thousand sites, as recently happened in China. It seems silly for the U.S. to address one situation and ignore the other.

"Congress gave the Committee only one tool: embargo. Embargo by itself is the equivalent of 'zero tolerance' or 'just say no' or 'choose abstinence,' and it is about as effective."

Government is all about sovereignty; it is about control: about controlling your own people, your own art, your own history. All nations share that impulse for control. But society should be wary of delegating the control of history to government. When ethnic strife and hatred of your nearest neighbor result in the destruction of hundreds of mosques and monuments in the former Yugoslavia, the loss of art is a symptom of a much greater social harm. When religious animosity spills into violence in India, and politicians bus Hindu militants in to destroy a four-hundred-year-old mosque using their bare hands and pickaxes, more than a mosque is lost. When ignorance and hubris in Afghanistan led the Taliban to blow up the Bamiyan Buddhas and take sledgehammers to the storerooms of the Kabul Museum, *so much was lost.* It does not console me that, as a matter of principle, UNESCO had refused months before to allow the works to be sent to safe haven in Switzerland because "art should not leave the country of origin."

I will end with just that thought; that we might be placing art in bad company when we grant exclusive control over it to governments. It makes me really nervous.

■ ■ ■

*CPAC section continues*

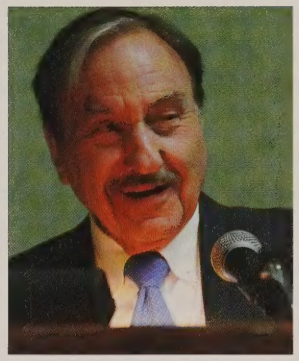
# The Chairman's View

JAY I. KISLAK*

I am prohibited from talking about anything that took place at a CPAC meeting or that was submitted to CPAC and was not discussed at a public meeting. So I did not prepare a speech because if I had, I would have had to present it first for review to the Bureau of Public Affairs and the Ethics and Legal Division of the U.S. State Department's Bureau of Educational and Cultural Affairs, and I was not about to do that.

Thus, I will comment on some of the issues raised by the previous speakers, beginning with an expansion of Nancy Wilkie's and Jack Josephson's description of CPAC membership. Jack Josephson's Committee was different than mine. It was not as *eclectic*. It was pretty well slanted — one way or another in the membership — and did not always have a full complement of eleven members. Our Committee has eleven members with two archaeologists and one anthropologist. The two archaeologists include Nancy Wilkie, who is a brilliant person and has had great experience in the public arena as head of the Archaeological Institute of America. Although she certainly has her own opinions about what should stay in the ground, what should come out, and how it should come out, she is reasonable and thoughtful.

Our anthropologist is a brilliant guy, who teaches anthropology and black studies at Harvard — that's up in Cambridge near the Charles River. On CPAC, he wanders from one side to the other, but you know where he stands, and he stands dogmatically. We also have three public members,



"The problems that occur [with CPAC] are built into the legislation. Because diversity is legislated, we have a diverse group, and it is not always easy to keep things going."

one of whom has been trained in archaeology. Until recently, we had two museum members. I have learned a lot in the last few years about how art museums, archaeological museums and historical museums differ, and how some will speak up more than others. We have a lady from the Association of Art Museum Directors in the audience this evening who perhaps can tell us more about it later. The archaeological museums are deeply committed to the same doctrine that the archaeologists are. That is, they will not touch anything that they did not take out of the ground themselves or that somebody did not take out the way they wanted them to. There are extremists at both sides. Some are extreme in the direction of dealers and collectors — much more so than they should be — about protecting the legacy of a country's history. To the other extreme, there are archaeologists who will not even look at an

* Jay I. Kislak was Chairman of CPAC from 2003 to 2008. He is also CEO of Kislak Realty Inc.; President of the Kislak Foundation; and a collector of manuscripts and the art of the early Americas.

item, however long it has been out, if they do not know where it came from and how and why, and if it was not excavated by a certified archaeologist. They will not even study it and put it into context.

Continuing on within the composition of the Committee, there is the dealer group. Unfortunately, most of the descriptions of the Committee membership this evening were made by Nancy Wilkie and Patty Gerstenblith. Their discussion of the dealer members as being experts in the international trade of art — as required by law [the Cultural Property Implementation Act of 1983] — has *absolutely* nothing at all to do with our current Committee. We have three members representative of the dealer group: one is a coin dealer and auctioneer, an outspoken person for the dealer point of view but with no experience in international dealing and a narrow interest in coins. The other — who recently left the Committee — is a wonderful gentleman who is a dealer in contemporary and modern art. He knew little about antiquities and never dealt internationally, so he was not an expert in that field. He had good political connections. The third is a dealer in African art, a gentleman from California who also has some political connections. His mother was the twin sister of Roberta McCain, John McCain's mother.

This gives you some description of the *kinds* of people we have, each of whom I admire and respect most of the time. The problems that occur are built into the legislation. Because diversity is legislated, we have a diverse group, and it is not always easy to keep things going. I am one of the public members, although I was criticized vehemently by the archaeologists before joining the Committee because I collected — I don't now — some Pre-Columbian artifacts. I was deeply involved in collecting rare books, maps and autographed documents important to the early explorations of America. When we acquired two copies of Columbus' letter to the King of Spain, from 1493 and '94, there was nothing earlier we could get in writing. So we became involved in Mayan artifacts, and some of those artifacts are part of our collection. For that I am royally hated in some quarters.

> "The Committee is purely advisory. . . . I can think of at least one occasion where the Committee's decisions — clear-cut and unequivocal — were not adhered to."

Another point: CPAC has public hearings, but they are too short. The public does not get enough of a chance — five minutes really — to be heard. To bring people down to Washington, let them make the trip from wherever they are coming, and speak only for five minutes, is not enough. But we do not have not much choice based on the time allotted.

To what extent can we talk about the staff? First, let me tell you a definition of a bad bureaucrat that I heard last week at the Library of Congress. A bad bureaucrat is one who does something. The staff, by its nature, has to be involved and also knowledgeable about the archaeological and ethnographic materials that are the subject matter of our discussions. Although the staff that I have seen are capable, extremely bright people who know quite a bit about what they are doing and do a fairly good job of attempting to be evenhanded, sometimes when somebody has a background in archaeology (as is the case), it becomes a bit difficult not to be slanted. However, the staff are government employees — bureaucrats — who run what we are doing.

To some extent I question CPAC's necessary importance. First of all, the Committee has no power. Patty Gerstenblith stated this clearly. The Committee is purely advisory, and it is advisory to the U.S. President. He has delegated power down through the State Department. Has that power

been abused? I can think of at least one occasion where the Committee's decisions — clear-cut and unequivocal — were not adhered to. Practically every other decision has been adhered to, but on at least that one occasion, this was not the case. Besides embargoing imports, the Committee has another power — stated in Article 2 of the Cultural Property Implementation Act. Article 2 permits recommendations from the Committee as to conditions or other things to be added. If, for example, CPAC recommends a Memorandum of Understanding be accepted by the State Department or by the Executive Branch, it can add conditions. At least one Central American country [El Salvador] successfully adhered to the requests of the Committee and the State Department to build a museum and do some other things, as part of the Memorandum of Understanding. So CPAC has some power beyond embargo. But, embargo is mainly all we do — import restrictions. It is too often confused with other issues that are involved between our government and foreign governments, such as repatriation or the National Stolen Property Act, and various other laws about which I know very little and which get very complicated. This fouls up a lot of the museums, too, and nobody knows how long they can retain what they have or how they got it.

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# Q & A

## *IFAR EVENING*, APRIL 17, 2008

### COMMITTEE APPOINTMENTS

**Q** What is the process, other than a political connection, by which a nominee to CPAC gets appointed or, for lack of a better word, "torpedoed"? In addition, how are their categories determined? Patty Gerstenblith's background, for example, is in archaeology and law. Why was she there as "the public"? Kate Fitz Gibbon was appointed as a member of the international trade, but she hasn't been a part of the art trade in thirty years.

**A** **PATTY GERSTENBLITH (PG):** It is a political process. What "slot" you end up in is up to the White House. They look at your background and resumé. Maybe, like Kate, I hadn't been an archaeologist for about thirty years. But it is not as if they asked me "What slot do you want to be in?" They put me in a slot. So, I wouldn't read too much into it.

**A** **JACK A. JOSEPHSON (JJ):** There has certainly been a dramatic change from the time I was on the Committee in 1990 to now. When I was on it, the Committee was under the USIA (The United States Information Agency), not the State Department. We did not sign secrecy agreements that I remember; I was not investigated by the FBI; I did not have three sponsors. I was simply proposed and accepted. It is a very different process today, maybe not entirely good.

**A** **NANCY C. WILKIE (NW):** The White House personnel office decides how CPAC appointments are made. In my case, there was no doubt that I would be appointed to the archaeological slot. But it is up to the personnel office of the White House to make recommendations to the President, who, in theory, makes the appointments. When people complain to me that the composition is unbalanced or that someone who is a representative of the general public really should be in a different slot, I say, "Don't complain

to me," nor can you complain to the State Department. You need to complain to the White House because *they* make the appointments.

**A KATE FITZ GIBBON (KFG):** At the same time that I was appointed, a number of people, probably more capable and more knowledgeable than myself, were also suggested. One of those people is in this room. I ended up being the only trade representative appointed. My understanding is that when dealers in materials that have the potential of being discussed by CPAC are suggested as Committee members, they are asked (in advance) to recuse themselves for any and all discussions that pertain to the materials that they deal with. There is concern about conflict of interest; that Committee members might have some financial interest in the decisions. I was asked to recuse myself from any discussion of Afghanistan. But since Afghanistan was not a signatory to the UNESCO Convention at that time and that was material that I only collected, not sold, I was willing to sign such a recusal. But these policies impact the ability to appoint Committee members who are actually knowledgeable about the field.

> "When people complain to me that the composition [of CPAC] is unbalanced . . . , I say, "Don't complain to me; . . . complain to the White House because *they* make the appointments." — Nancy Wilkie

**A NW:** Jay Kislak mentioned that one CPAC member is related to John McCain and is a dealer in tribal art, especially from the country of Mali. When the request for the renewal of the bilateral agreement with Mali came up, this was a potential issue. In fact, you are not required to recuse yourself; you are required to have a discussion with the legal department, at which time you learn what kinds of restrictions might be put on you. In that case, the legal department said: "The reason you are on this Committee is that you bring so much expertise to it. We would be shooting ourselves in the foot if we were to say that you cannot be part of this discussion." He was part of that discussion and did not choose to recuse himself.

**A KFG:** Then things have changed...

**A NW:** Well, *that's it.* It is a political thing — each administration can do what it wants with the Committee.

**A JAY I. KISLAK (JK):** I think both of you are right (KFG: "That's why he's chairman.") The fact is that the personnel department at the White House, which I have had some exposure to over the last twenty years, was particularly well staffed when we were appointed. That is to say, they had a brilliant, capable young man with a doctorate from St. Andrews College, who went out of his way to find as many good, reliable people as he could. I think he made a few mistakes — not because the people are unreliable but because some of them may not fit in quite the way the law intended. But on the whole we have had a good Committee.

Nancy is right regarding the question of conflict of interest. But, so is Kate, except that no longer is anyone requested to recuse himself, at least not since I have been chairman. Anybody good is going to have a conflict of interest because we have diverse views, and, except for the public representative, represent a particular constituency. We who are "public members" represent the 300 million people who comprise the "public." I'm getting fleeced by both sides. Complaints on this subject from both ends of the spectrum have been made to the Committee. They were also made to the State Department, but the Department did not even want it discussed. I insisted that if a letter came in addressed to me as chairman, the Committee would hear about it. I fought tooth and nail not to keep it secret because I don't

believe in secrecy. There's no reason in the world for it to be secret. We'll get to that issue later. In each instance, the conclusion was made that whether somebody should recuse him or herself was between that person and his conscience. To the extent the person wanted to, he or she could discuss it with the ethics department of the legal division of the State Department. That was done by several people, and in each case, the conclusion was that they would vote how they wanted to vote. That's the way it's been operated.

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"Anybody good is going to have a conflict of interest because we have diverse views, and, except for the public representative, represent a particular constituency." — Jay Kislak

### SECRECY AND TRANSPARENCY

**Q** Could you elaborate on two words that have repeatedly come up: transparency and secrecy. There's a general sense about the Committee that more than is necessary is not being made public. There is even a Freedom of Information suit right now.

**A** **KFG:** The ostensible notion is that the Committee needs to feel free to discuss the issues. That would argue for secrecy. Also, the Committee sometimes receives specific information about archaeological sites. The Committee, I was told, was asked by some of the requesting countries to keep the requests secret in order to prevent looters from attacking the sites. Having read the binders, I don't find that a legitimate argument. Others at this table may find it so. Source nation requests are secret; they are summarized and made public. CPAC staff work is secret. Meetings are conducted in secret. Minutes and reports are secret. They are tape recorded, lest we say the wrong thing and "big brother" hear. Staff is not forthcoming with information, in my experience. Maybe that has changed. In my first Committee meeting, I was not provided with a clear request or the earlier recommendations of the Committee. Since the Committee is supposed to be asking "Has the country done a good job or not," and you don't have anything to compare the new request to, that can make things difficult.

The argument that looters will use the Committee briefing materials to seek out sites is ridiculous. In one briefing report that we received, eighty percent of the items were things from eBay — showing there was a market. Is this disingenuous on the part of the Committee and the State Department? Is it paranoid? I think it might just be embarrassing.

"The argument that looters will use the Committee briefing materials to seek out sites is ridiculous. In one briefing report that we received, eighty percent of the items were things from eBay." — Kate Fitz Gibbon

**A** **JK:** This question of secrecy has been one of my pet peeves. Kate talked about a binder that we get with information — probably 200, 300 pages. Page after page has pictures with stuff on eBay, and the page is marked "Confidential — Do not publicize." Stuff that came from other publications! I pointed that out and was told, "We put that on every page." Maybe Nancy, Jack or Patty can tell us that when they were on the Committee, they heard state secrets discussed. I never did. I never heard anything that was diplomatic material. Occasionally, people have said, "Well, we do not want to disclose where the sites are." The sites were as indicated in their requests, and the looters had already been there. I think that's a rather weak argument.

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This is the only advisory committee that I have been able to find that conducts everything in secret and will not disclose anything. Several members of our committee would like it more open, even some who are dedicated archaeologists. One member from Iowa, who came from an archaeological museum, worked with the Law Department, and was Dean of the University of Iowa, said, "I've been working with sunshine laws in the state forever. There's nothing I've said that I'm ashamed of. And whatever I say, I am perfectly willing for everybody else to hear." But we have been unable to do this. It has just come to my attention that a bill in Congress has passed the Information Policy Subcommittee of Chairman "Lacy" Clay from Missouri, whose intent is to open up the process of all advisory committees — how people are selected to join and how the committees are operated. I don't know whether our committee is included or not.

> "This question of secrecy has been one of my pet peeves."
> — Jay Kislak

**A PG:** I have not seen this legislation, but I assure you I will be looking it up. Indirectly, or directly, Jay, you've made a good point, which is that this is not a process that is unique to CPAC. There is a Federal Advisory Committee Act,[1] which is part of the Administrative Procedure Act, which is part of Title 5 of the U.S. Code. There's also The Freedom of Information Act,[2] which establishes what things are kept confidential within the Government. It also establishes times when Government officials can make determinations when things should be kept confidential.

One area frequently kept confidential is foreign relations. Now, obviously, information that's already out — news articles, eBay, things you can get off the Internet — let me point to making those public. Anyone who is interested can find it. But we have to ask: Does the country expect confidentiality when it submits the request? This is part of our foreign relations. Jack Josephson made the point that it's part of our public diplomacy. We have to handle the request with consideration for the country involved. This is not just a matter of the United States.

U.S. law, as applied to U.S. domestic sites under the Archaeological Resources Protection Act (ARPA), and also most state laws have provisions for keeping the locations of archaeological sites confidential, whether they have been looted already or not. Their locations are not placed out in the public domain so as not to make it easier for the looters. I recall there being requests to CPAC that contained law enforcement data, information from the police unit dealing with archaeological protection. The countries have the right to expect that this would be kept confidential. This is not all one-sided and not idiosyncratic to this committee. There are many federal advisement committees, and I have to beg to differ with Jay; I don't think that they are all completely open to the public. That is unlikely. I doubt that the Defense Policy Review Board is open to the public. So, it's a little more complicated than we have made it sound; we have to keep the foreign relations aspect in mind.

**A NW:** The Senate Report at the time the CPIA was under consideration gives another reason that there should be closed Committee meetings: If the information became public it might inhibit the President's ability to negotiate agreements authorized by the Act. There could be cases where information came out that would make it impossible for the President to enter into a bilateral agreement because somehow we offended the other country in the course of

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1 Federal Advisory Committee Act (5 U.S.C. Appendix 2).

2 The Freedom of Information Act, 5 U.S.C. ' 552, as amended by Public Law No. 104-231, 110 Stat. 3048.

our discussion. We do not know what that slight might be, but the potential is there.

**A JJ:** I doubt that Nancy. I can't imagine that. The countries are coming to us asking for a favor. How on earth would transparency affect that?

**A PG:** It's not a matter of whether the countries enter into an agreement, but when we offend them, there are other ramifications beyond whether they enter into an agreement. Sometimes people on the Committee say unusual things about countries, and it is up to the government to decide whether it wants something else in exchange from that country. All is a product of diplomacy, and to have everything that is said about a country made public means that the government is not going to be speaking with one voice. In foreign affairs it is very important that governments speak with one voice. Within the confidentiality of the Committee, Committee members are free to express their views, to criticize countries, to say what they want, but when it becomes something that is actually said to the other country, that should be said with one voice.

**A KFG:** We're not just talking about diplomacy and the ability of the State Department to refrain from stepping on people's toes. We're also talking about important decisions that are going to be made about what type of art will be accessible to the American public. We have a public interest in this Committee that is very substantial. This is not just about foreign relations; it is about what happens in domestic cultural policy here in the United States. To permit a situation in which the actual request by a country in terms of the detailed information regarding the items that the country wishes to place on a list of items that will no longer be allowed to enter the United States, to have that information not be available, as was the case when there was a last minute addition of coins to a certain request [Cyprus], that does a real disservice to the American public interest. It is also a disservice to the principle that the People can come to Washington to have their five minutes "in the sunshine" and to argue for or against an element of the request. For my delectation and amusement, I downloaded President Bush's tax return the other night just to compare it to some of the tax returns of the people I serve at a tax clinic. The IRS marked out [redacted] the medical information and Social Security numbers for Mr. and Mrs. Bush. Good idea. We could mark out the archaeological sites; we could mark out the police information, which I remember as being unbelievably scanty, but maybe there was something I skipped. I agree with you on that. But there are many other parts of the request, and we do a tremendous disservice to the American public by failing to make that information accessible.

> "We have to ask: Does the country expect confidentiality when it submits the request? This is part of our foreign relations."
>
> — Patty Gerstenblith

**Q SF:** To sum up, maybe it shouldn't be an all or nothing secretiveness. We all know what needs to be kept private. It creates a bad atmosphere when people can't get information. I myself asked for the most innocuous information a few years ago for an *IFAR Journal* article. I could not get an answer.

> "We may not be able to document a diminution of the looting; that's a very difficult thing to do. But we can document if the country has taken steps to try to stop the looting . . ."
>
> — Nancy Wilkie

## MEASURING RESULTS

**Q** Everyone on the panel has agreed that the reason behind the Memoranda of Understanding (MOUs) and the Emergency Actions is to deter looting. Has either the State

"The fact that this Committee does not make decisions and that its deliberations don't have to be followed by the decision-makers makes us wonder why we are doing all this."

— Jack Josephson

Department or the Committee itself, when looking at renewals, done something to assess whether looting has actually been deterred as a result of entering into these agreements? Is there any direct evidence of that?

**A JJ:** Not while I was chairman. The countries never showed us those diminutions in looting, but of course at that time [1990-95] it was the beginning of CPAC. Maybe Jay or Nancy could answer that better.

**A NW:** This is part of our review of the request for the MOU, or our interim review of the agreements. Is the country taking actions to try to stem the looting of its antiquities? A lot of this is very difficult to document, even in this country. It's very hard to know where the looted sites are. If you think about Central America, the looting takes place in the jungle, which people can only get to once or twice a year because of the weather or political situations. But it is a question we always ask.

**A PG:** To some extent, you are asking for negative evidence. In other words, how much looting would there have been if we didn't have the agreement in place? We're never going to know the answer to that question.

**A JK:** Patty's right in this respect. Your question was "Do we find out whether or not the MOU, which restricts the importation into this country of "cultural property," has been effective in helping to deter looting?" The answer is, we ask the questions, but as Patty and Nancy have said, it's so difficult to know. In most cases we find that looting has been ameliorated a little bit, although it certainly has not been eliminated. But I don't know if there is any direct correlation between that and these import restrictions.

**A KFG:** I recall that we were often given reports if there was an arrest of a looter or a smuggler, so we were able to track whether the government had made any effort. I noticed a couple of reports of peasants being arrested. I don't remember arrests of any collectors or high-military officials, who often form part of the collecting base, particularly in South America. Nor does CPAC have the expertise to integrate larger political happenings. In Peru, the Sendero Luminoso (Shining Path) was very heavily involved in forcing people to loot and in using looted materials to finance their activities, but I don't recall that coming up in our discussion of Peru.

**A NW:** We may not be able to document a diminution of the looting; that's a very difficult thing to do. But we can document if the country has taken steps to try to stop the looting by educating children or by educating people when they leave or even enter the country that it's illegal to take antiquities out of the country without an export permit. Those are the kinds of things we also need to look at when we're reviewing the MOUs or renewal requests. How many children have been exposed to courses in school where they are taken to museums and archaeological sites and taught the value of their cultural heritage, and has that been increasing over time?

"It seemed to me that there were a lot of contortionist moves on CPAC that were made necessary because the requests were inadequate in some way or another."

—Kate Fitz Gibbon

**Q** I'm a retired museum attorney. There must be other importing countries who are signators of the UNESCO Convention who are going through similar processes. Do you ever get information about what they are doing and

whether, combined with what we are doing, there is an impact on the potential looting?

**A** **PG:** Yes, we do look at what is called the third determination; that is, the question of what other countries that have significant import trade are doing to restrict or reduce the importation of looted or undocumented materials. But the countries that have ratified the UNESCO Convention have different types of implementation. Not all need implementing legislation like the CPIA. Some countries view the treaties as "self-executing," which means that you don't need to pass domestic legislation. Or some countries, such as Australia, New Zealand, and Canada, say that in order for us to import something from a country that is a part of the UNESCO Convention, there must be an export license. They don't enter into specific bilateral agreements like we do. They don't evaluate it — it's an across-the-board restriction requiring an export license if the object is subject to export controls from the other country. There are now 117 countries who are party to the UNESCO Convention. The U. S. has agreements only with 11. [**Editor's note**: As of January 2009, there are 12.] We used to have one also with Canada. So, that's roughly one-tenth of the potential, whether you think that's a good thing or a bad thing. Several of the art-importing market nations have ratified the Convention in the last five or six years, including Switzerland, which is the only other country, in addition to the United States, that requires a bilateral agreement. Their law went into effect in 2005, and in under three years, they already have bilateral agreements with three countries [Italy, Peru, and Greece]. There's nothing equivalent to CPAC in Switzerland; the decision is made completely by the Ministry of Culture, and it's done in a different, much less bureaucratic, process. The United States is the only country that has set up this kind of a system.

## DECISION MAKING

**Q** How do you reach your decisions, and are they unanimous? Do you have a vote?

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Do you say we're going to go this way on this? It seems [the decision] generally goes in one direction. Second, of what does your advice consist? Do you give the Bureau of Education and Cultural Affairs a point-by-point explanation of how you see this working with respect to the four points? Do you give them a long document with the pros and cons? Who drafts it, and what kind of review does it have?

**A** **PG:** In my experience the Committee votes on each of the determinations. Not everybody agrees all the time. A majority report is prepared, and every member of the Committee gets to look at it. People who want to can then write a minority report — in other words, a dissenting opinion. I believe it's all sent to the decision-maker — remember this is just a recommendation.

**A** **KFG:** When I was on the Committee, *staff* was writing the majority reports and circulating them. If anyone disagreed with the report, that person wrote a dissenting report which went with the majority report. I do not know if staff is still writing the majority report, or if the Committee has taken on that task.

**A** **JK:** The staff drafts the report, but they do it from the work the Committee has done. And Patty is right, with one addition — we vote on the four determinations *plus* a fifth, which I have never quite understood. That is, there is an overall recommendation for or against a MOU. Why this is necessary after deciding these other four points — but that is the way it is done. At the end, we add items under Article 2 in the recommendations that we send to the staff, which prepares it and sends it back to us to review before it goes out. I know I'm not nearly so smart as most people in this field, but I don't understand Determination C, the third one — I'll read it to you:

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"Determination C — that

(i) the application of import restrictions [that we would impose] with respect to archaeological or ethnological material of the State Party, if applied in concert with similar restrictions implemented, or to be implemented within a reasonable period of time, by those nations (whether or not State Parties) individually having a significant import trade in such material, would be of substantial benefit in deterring a serious situation of pillage, and

(ii) remedies less drastic than the application of the restrictions are not available."

Now, this is a lot more confusing to digest than Patty showed before, and I have great difficulty comprehending how eleven people from diverse views can answer these questions.

"The import restriction is just the beginning of the process, not the end. It actually establishes a bilateral relationship with the other country."
— Patty Gerstenblith

**A JJ:** The fact that this Committee does not make decisions and that its deliberations don't have to be followed by the decision-makers makes us wonder why we are doing all this. I think, Jay, that you said that before. Secondly, this question of "other countries" and their importation of this [endangered] material, I don't think the United States has any clue as to what those markets are, or how *big* they are. At least I never saw a determination. For example, how much material does Japan import? Japan used to be the principal importer of looted property from Thailand and Cambodia. They never did a thing about this. I don't know if they have done it today. Are they signators [to the UNESCO Convention] today?

**A PG:** They are a party, but Japan's implementation is pretty narrow, let's just put it that way.

**A KFG:** There has certainly been a sea change. Many countries have undertaken to be much more active in scrutinizing the type of materials for which they permit entry. I would note that at the time when we were on the Committee, this was less likely to be the case. At that point, merely being a signatory to the Convention was at times argued to be sufficient indication that the other country was going to be working in concert with the United States. The country didn't have to do more than that. I think the situation has changed now.

## LEGAL THRESHOLDS

**Q** I'm a lawyer and teach a seminar on cultural property law. Kate Fitz Gibbon made some comments about the search for standards and thresholds and also about some dubious constructions of the law — maybe the law being altered in the interpretation by the Committee. I wonder if Ms. Fitz Gibbon could elaborate on those comments and whether other members of the Committee could also respond.

**A KFG:** I'm a plain reader, and, to me, a threshold is a threshold and not a bump in the rug. I see the Committee's work as largely aspirational. There are very clear desires on the part of all of the members to solve what we all see as a disastrous situation of looting. I think that in many instances the Committee has been kind of put-out-of-business by the use of other laws, for example, the National Stolen Property Act in the Frederick Schultz case.[3] It's a lot harder for a

[3] *United States v. Schultz*, 178 F. Supp 2d 445 (S.D.N.Y. 2002), *aff'd* 333 F .3d (2d Cir, 2005); *cert. denied*, 540 U.S. 1106 (2004).

country to spend a bunch of money, put together a request, and come before the Committee to ask for something that they're not sure they're going to get than to invoke other laws. In the case of the recent actions against some museums in California regarding Ban Chiang antiquities from Thailand, and what looks to me to be a penny-ante tax fraud case, the Archaeological Resources Protection Act (ARPA) instead of the National Stolen Property Act may open another avenue of legal interest. So, although I can't talk about what went on in Committee and don't want to – I'm speaking from my perspective and my plain reading of the law – it seemed to me that there were a lot of contortionist moves on CPAC that were made necessary because the requests were inadequate in some way or another. I was shocked when I first came on the Committee that we were handed a list of the four determinations and the second half of Part C was missing. I went onto the Committee as a layperson, but I have since been inspired to go to law school as a result.

**Q** Do all four determinants have to be "yes" in order for the fifth to be "yes" overall? It seems that not all four *are* always in place.

**A** **PG:** The answer is that the decision-maker has to find all four in place. Jay, thank you for reminding us about the fifth one: Is there a less restrictive alternative? I forgot about it. There is a big difference between the *import restrictions* under the CPIA and using the National Stolen Property Act (NSPA). Under the CPIA, you don't have to show that the importer knew or intended to violate the law. It has no criminal penalty to it. It is only a civil forfeiture. There is no knowledge or intent requirement, so that makes the CPIA very different from the NSPA or now the Archaeological Resources Protection Act, which can apply in some cases. All three might apply in some cases. But each one is different. So you can't really say we have Schultz's conviction and the NSPA, and the CPIA doesn't matter anymore. It's almost like apples and oranges.

I want to refer to, and Jay has talked about, the Article 2 part of the agreement, which says what we would like to see the other country do or change. Most people, particularly, I'm sure, in the market community, focus on the import restrictions side of CPIA, and that's understandable. But to me, the import restriction is just the beginning of the process, not the end. It actually establishes a bilateral relationship with the other country, and a lot of that I think is the public diplomacy question that Jack Josephson referred to and is embodied in the Article 2. Jay Kislak referred to El Salvador, which rebuilt its museum after it had been destroyed. I prefer to refer to the case of Italy. When Italy first made its request to the United States, the maximum amount of time they would allow an object to be on loan outside of Italy was six months. By the time the bilateral agreement was finalized, it had been extended to *four years*, first two years and then later four years. That was a significant change on the part of Italy, giving the museum community [in the U.S.] something that they wanted, long-term loans to make it financially feasible to have traveling exhibits. I would like to see these loans extended for longer periods of time than four years, but this really shows that it is a give and take. Another thing the United States does in some cases is help to provide training to countries; training for their customs officials; for site guards; and how to protect museums. So it really is a part of public diplomacy, it really is a bilateral relationship.

## DENIAL OF REQUESTS

**Q** I'm Gerald Stiebel, a former member of CPAC from the beginning of 1995 to the end of 1999. I want to thank the panel because I have learned a lot tonight about the way things have changed. In my time, no request was ever turned down, be it a renewal, a MOU, or an emergency action. As Patty has mentioned, sometimes recommendations were made by the Committee, and sometimes not, but the recommendations

didn't always appear in the draft report that we received. And nobody has addressed the subject of the agenda of the U.S. Information Agency (USIA), the former government agency housing CPAC.[4] The office of personnel may recommend people, but it was often the administrative head who made the final decisions on whether to accept them or not.

My question: Does anybody know of any request by any country that has ever been denied?

**A** **PG:** No *initial* request has ever been denied. Canada's request for an *extension* was denied. We only had a five-year agreement with Canada [1997-2002].

"No *initial* request has ever been denied. Canada's request for an *extension* was denied."

— Patty Gerstenblith

**Q** Did Canada make a formal request for renewal?

**A** **PG:** Absolutely. It was the same as anybody else's request for extension. It went through the public session, it went through all the discussion. The end result — I don't want to tell any tales out of school here — is that it was not extended. Another thing that can happen is that what a country asks for is not always the same as what the ultimate agreement covers. For example, the original Italian request was much broader in scope than the Agreement. I was not a member of the Committee at the time, but I attended the public session.

"I know of one — and only one — example [of an initial request by a country that was denied]. During my chairmanship, the Greek government of Cyprus requested a ban on church material. It was turned down because Turkey was then in control of the area of Cyprus that they were bitter about. However, it wasn't turned down by the Committee itself. It was turned down by the staff."

— Jack Josephson

**A** **JJ:** I know of one — and only one — example [of an initial request by a country that was denied]. During my chairmanship, the Greek government of Cyprus requested a ban on church material. It was turned down because Turkey was then in control of the area of Cyprus that they were bitter about. However, it wasn't turned down by the Committee itself. It was turned down by the staff.

**Q** **KFG:** Do you care to elaborate on that?

**A** **JJ:** I heard about it because the Cypriot ambassador told me.

**A** **JK:** Regarding the question "has anything ever been turned down," at the moment, even this newly formed Committee, which has had more members who are not archaeologists than was the case before, still, is overwhelmingly involved in one cause, as is the staff. So long as that continues to exist, you will not see things turned down. In every other branch of government, there is disclosure, information is made public. We have a democracy, and it is a government of the people, for the people, by the people, not by the bureaucrats over them. A major question with this Committee is: Are we, as members of the Committee, there to receive the information that staff chooses to give us, and then, because we were appointed by the U.S. President, sign off and recommend something to the decision-maker? Or, are we the Committee for whom the

[4] From 1983 to 1999, the Cultural Property Advisory Committee was "housed" in the U.S. Information Agency. In 1999, the USIA was consolidated with the U.S. Department of State, and CPAC was transferred to the State Department.

staff works? Even Patty will tell you, the latter is what the law says — that staff will be provided by the USIA or by another agency of the executive branch. But that's not the way it actually works. It should be that the staff will work for *us* and do what *we* want *them* to do, and look for the information that *we* want *them* to look for, where we want them to look for it. But we can look long enough, and we're out of office, and they're still there. Unfortunately, that's the way government works.

**A** **SF:** I told Maria Kouroupas [Executive Director, CPAC] that she would want to be on the program to respond if staff were discussed.

**Q** I work in the trade. The last question segues nicely into mine, which is on a more practical note: What can *we* do? While it does seem that a lot gets done by the Committee, it also seems that a lot is flawed. The system itself is removed from the decision-maker, whose decisions will affect us. So, at the end of the day, if you've got a whole generation of people coming into the field with opinions that they want to share, what should they do beyond the five minutes in front of the Committee? Would it be more efficacious to go to the media, like the source countries have done? What are our options?

**A** **PG:** The first option is to write letters. There is no page limit on the letter. Any member of the public can submit a letter — it doesn't mean you have to come to the meeting. Everybody who addresses the Committee has already written a letter, and the real point of the presentation — the reason for the five minutes — is for the Committee to ask *them* questions. It's not just to repeat what was in the letter. … It's your decision whether you want to go to the media.

**A** **JK:** I heard her ask a different question, Patty. I didn't hear her ask how can she get information to the Committee; I heard her ask that, if she feels strongly about the way the

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Committee operates, what can she do about it? You cannot do anything by writing to the Committee; you cannot do it by writing to the State Department. Write to your Congressman if you want something done, because this Committee is going to continue in secrecy so long as the people controlling it can control it that way. And I want to make it clear that I am not necessarily against any actions that were taken or any of the MOUs which were recommended by the Committee and put into action. I am, however, opposed to the way it is done because I think it is absolutely, completely, un-American, and I don't mind saying that. Not anywhere in our government do we do things this way, except with this group. Patty seems to disagree, and I know she's wrong.

"Write to your Congressman if you want something done, because this Committee is going to continue in secrecy so long as the people controlling it can control it that way."

— Jay Kislak

**SF:** Maybe on that note, that alpha and omega of the panel, we can end. This has been a fabulous panel; you heard things that you have never heard before. I am astonished, however, that there wasn't a single question on the request from China or on the Freedom of Information Act lawsuit. I thank you all for coming and ask you to join us for the reception.

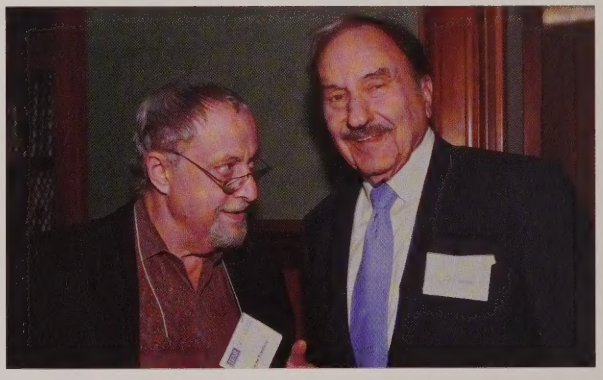
▪ ▪ ▪

# Scenes from the *IFAR Evening*

LEFT TO RIGHT: Magda Saleh, Mary Jane Harris and Sharon Flescher, IFAR's Executive Director

Emmanuel Lemakis and Linda Downes

Aaron E. Rosenthal and Nancy Wilkie



Jerome Eisenberg and Jay Kislak

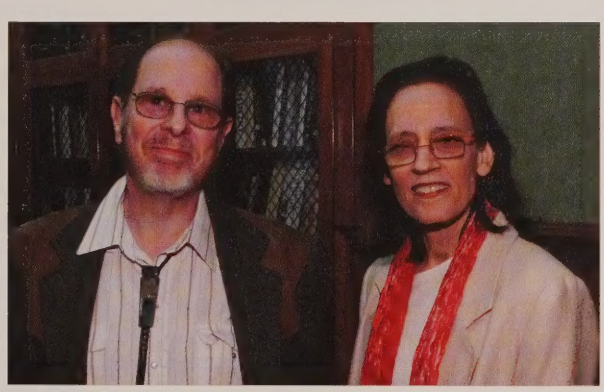
Helen and Philip Jessup

Judith Hernstadt and Jay Kislak

Arthur and Ruth Feder

LEFT TO RIGHT: Patty Gerstenblith, Thomas Kline and Victoria Reed

LEFT TO RIGHT: Jay Kislak, Shelby White and James Lally



Gerald Stiebel and Penelope Hunter-Stiebel

LEFT TO RIGHT: Chin Yan Wong, Athena Zonars and Hugo Weihe

Sherri North Cohen (left) and Judith Pearson

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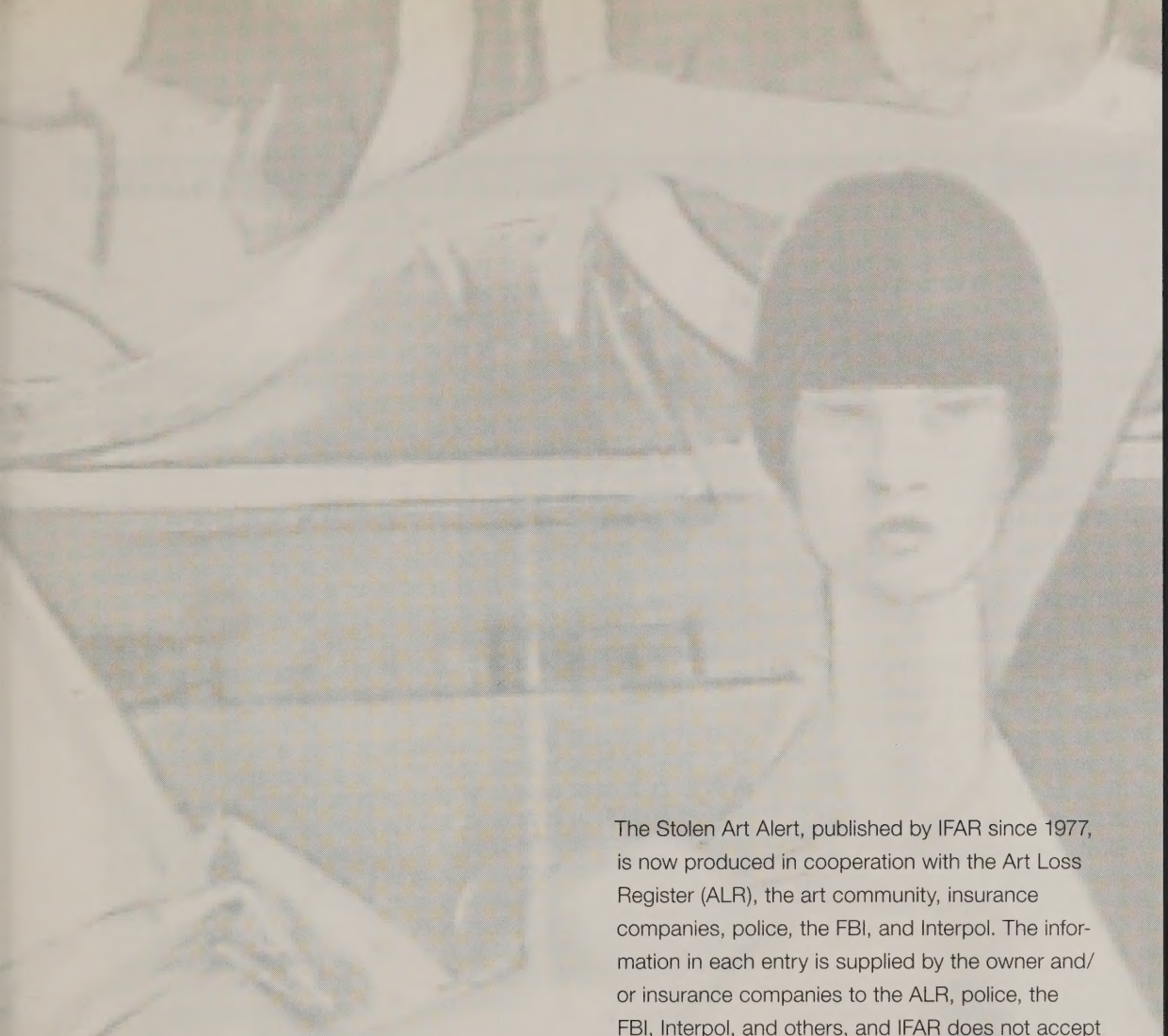

# STOLEN ART ALERT

The Stolen Art Alert, published by IFAR since 1977, is now produced in cooperation with the Art Loss Register (ALR), the art community, insurance companies, police, the FBI, and Interpol. The information in each entry is supplied by the owner and/or insurance companies to the ALR, police, the FBI, Interpol, and others, and IFAR does not accept responsibility for, nor make any representations with respect to, accuracy or authenticity.

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The photo of each item is accompanied by a brief description of the work, the ALR catalogue number, if registered, and the date and place of theft. An asterisk before the catalogue number means that a photograph of the stolen work is available, although not necessarily included in this issue.

Anyone wishing additional information should contact the ALR at 212.297.0941.

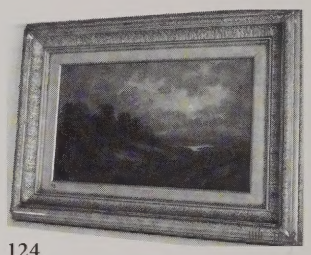
# STOLEN ART

## PAINTINGS

123 HENRY WILLIAM BANKS DAVIS (English, 1833-1914). ***Cattle Grazing.*** Oil. 21 x 30 cm *L08.602. Stolen from a private residence in St. Andrews, Fife, England on June 28, 2008.

123

124 A. COLEMAN (English, 19th century). ***Landscape,*** 1880. Oil on canvas. 12" x 20". *L08.940. Stolen from a private residence in East Sussex, England on September 25, 2008.

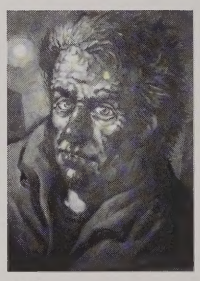


124

125 JIM MORGAN (American, b. 1947). ***Sage Grouse.*** Oil on canvas. 12" x 18". *N08.581. Stolen from a private residence in Ho-Ho-Kus, NJ on October 15, 2008.

125

126 PETER HOWSON (English, 1950-1999). ***Self Portrait.*** Oil on canvas. 28" x 18". *L08.941. Stolen from a private residence in Middlebury, England on September 24, 2008.



126

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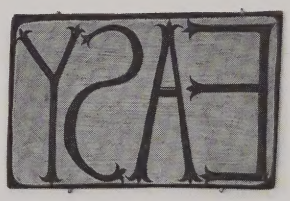
*The following two paintings by* MARGARET KILGALLEN *(American, 1967–2001) were stolen from a gallery in San Francisco, CA on October 15, 2008. *N08.556:*

127 ***Untitled (Easy),*** 1996. Enamel on panel. 7" x 12".




127

128 ***Portrait of a Woman,*** 1996. Enamel on panel. 17" x 12".

128

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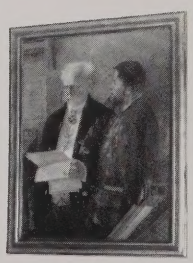
129 FRANÇOIS GÉRARD (French, 1770-1837). ***French Game – La Main Chaude,*** 1850. Oil on canvas. 39 x 51 cm. Signed l/r. *L08.969. Stolen from a frame restoration shop in Belgium on July 27, 2008.

129

130 VLADIMIR MAKOVSKY (Russian, 1846-1920). ***Portrait of Two High-Ranking Civil Servants,*** 1875. Oil on canvas, 120 x 85 cm. *N08.579. Stolen from an airport in The Netherlands on January 7, 1999.



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* Numbering for the year 2008 Cumulative Index of Stolen Art began with Vol. 10, no. 1.

132

135

137

138

139

140

*The following six paintings were stolen from a private residence in Los Angeles, CA on August 23, 2008. *N08.496. See also item nos. 154-155 below:*

131 LYONEL FEININGER (American, 1871–1956). ***Fin de Séance,*** 1910. See color photo on inside back cover.

132 CHAIM SOUTINE (French, 1894–1943). ***La Vieille Dame au Chien,*** 1919. Oil on canvas. 91.5 x 65.1 cm.

133 CHAIM SOUTINE (French, 1894-1943). ***La Femme en Rouge,*** 1926. See color photo on inside back cover.

134 KEES VAN DONGEN (Dutch, 1877-1968). ***Woman in Red Hat (Alicia Alanova),*** 1933. See color photo on inside back cover.

135 ARSHILE GORKY (American, 1904-1948). ***Cubist Still Life,*** 1928. Oil on canvas. 56 x 38 cm. Signed l/r.

136 HANS HOFMANN (German, 1880-1966). ***Untitled (Blue Bottle),*** 1947. See color photo on inside back cover.

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*The following four paintings were reported stolen in Argentina in 2008. (*L08.082):*

137 JUAN MARIANO AREU CRESPO (Argentinian, b. 1909). ***Carnival in Posadas.*** Oil on canvas. 60 x 80 cm. Inscribed: Satan Lucifer. Signed l/r. Interpol no. 2008/24485-1.3.

138 ANTONIO BERNI (Argentinian, b. 1905). ***Hostages.*** Oil on canvas. 196 x 198 cm (77.17 x 77.95 in). Interpol no. 2008/24561-1.8.

139 JOSE MALANCA (Argentinian, 1897-1967). ***Mountain Landscape.*** 110 x 120 cm. Signed l/r. Interpol no. 2008/20282-1.1.

140 BERNARDO MANE (Argentinian). ***Still Life.*** Oil. 46 x 38 cm. Interpol no. 2008/24485-1.1.

141 ANDREJ GARAY. ***Portrait of a Boy,*** 1988. Oil on cardboard. 60 x 50 cm. Signed l/r. *L08.082. Interpol no. 2008/22137-1.8. Stolen in Slovakia in 2008.

142 NICHOLAS ROERICH (Russian, 1874-1947). ***Sergy the Builder.*** Tempera on canvas. 66 x 122 cm. *L08.082. Interpol no. 2008/15987-1.2. Stolen in Russia in 2008.

143 ANTONIO PEDONE (Argentinian, 1899-1973). ***Still Life.*** Oil. 63 x 59 cm. *L08.082. Interpol no. 2008/20137-1.2. Stolen in Argentina in 2008.

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*The following 10 paintings were among 21 works discovered missing from the studio of the late artist* PIERO DORAZIO *(Italian, 1927-2005) in Todi, Italy in 2007. See also no. 89, Successione, published in the Stolen Art Alert, Vol. 10, no. 2, IFAR Journal:*

144 ***Rosso in casa,*** 1954. Oil on canvas. 95 x 65 cm.

145 ***Paradiso per Monnalisa,*** 1955. Oil on canvas. 71 x 90 cm.

146 ***Senza titolo (Untitled),*** 1959. Oil on canvas. 20 x 30 cm.

147 ***Senza titolo (Untitled),*** 1959. Oil on canvas. 40 x 30 cm.

148 ***Quasi-vert,*** 1963. Oil on canvas. 73 x 54 cm.

149 ***Ex tempore IV,*** 1963. Oil on canvas. 45 x 61 cm.

150 ***Primo,*** 1964. Oil on canvas. 22.5 x 30.4 cm.

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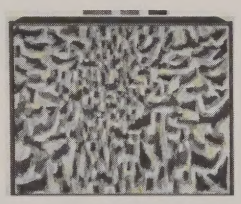

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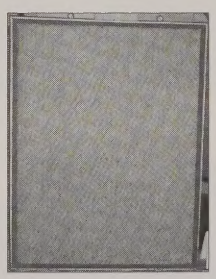
146



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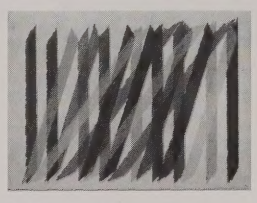
148



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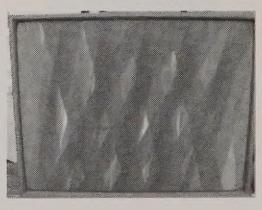

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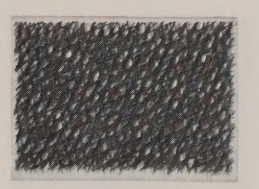
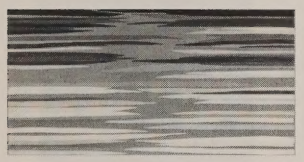


151

151 ***Vista II,*** 1964. Oil on canvas. 25 x 35 cm.

152 ***Punte I,*** 1974. Collage. 50 x 100 cm.

153 ***Punte II,*** 1974. Collage. 50 x 100 cm.



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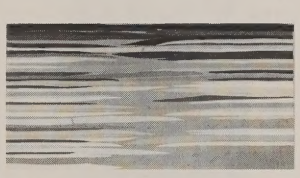


153

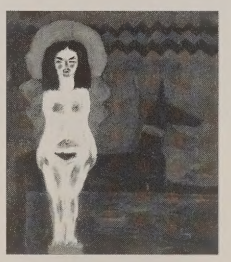
154

## WORKS ON PAPER

The following two works on paper were stolen, along with item nos. 131-136 above, from a private residence in Los Angeles, CA on August 23, 2008. *N08.496:

154 MARC CHAGALL (Russian/French, 1887-1985). ***Les Paysans.*** Gouache on paper. 61 x 47 cm. Signed l/r.

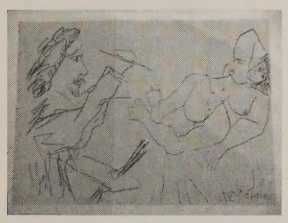
155 EMIL NOLDE (German, 1867-1956). ***Figure with Dog,*** 1912. Oil on paper. 78 x 79 cm. Signed l/r.



155

## PRINTS, LITHOS, ETCHINGS

156 PABLO PICASSO (Spanish, 1881-1973). ***Sans titre,*** 1968. Etching on paper. 9 x 12.5 cm. Ed no. 33/50. Dated l/r mirrored: 20.06.68 and Roman IV or VI. *C08.105. Stolen from a private residence in Bad Homburg, Germany on October 4, 2008.



156

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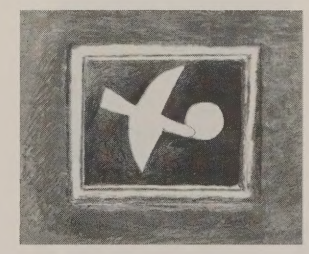
*The following works on paper by* BRAQUE, MATISSE, *and* PICASSO *were among 30 items stolen from the Fasenengalerie in Berlin, Germany during the New Year's holiday, December 31, 2008-January 1, 2009. *C09.0001:*

GEORGES BRAQUE (French, 1882-1963):

157 ***Astre et oiseau (Star and Bird),*** 1958. Colored lithograph on Japanese paper. 49 x 38 cm. Several inscriptions: blue and black initials G.B. under rasterized section. Below this: G. Braque. On the left, below the bird's wing: H.C.



157

158 ***Bouquet de fleurs,*** 1959. Colored lithograph on velin. Signed. Numbered 26/75. Inscribed in lower portion: [Nos bons voeux] G.B. George Braque 1959.

159 ***Composition,*** 1960. Colored lithograph in velin. Monogrammed in stone. 15.5 x 50 cm.

160 ***Personnage sur fond rose (Figure on Rose Ground),*** 1958. Print on Japanese paper. 51.5 x 33.5 cm. signed l/l: E. A. Epreuve D'Artiste. Signed l/r: G. Braque.

161 ***Le Bouquet,*** 1962. Colored lithograph on velin d'Arches. 32 x 25 cm. Signed l/r: G. Braque. Valier 188. Mourlot 145.

162 ***L'essor III (Taking Flight III).*** Print on Japanese paper. 27.8 x 18.4 cm. Signed l/r: G. Braque. Numbered l/l: 14/30. Valier 163.

163 ***Pichet,*** 1960. Colored litho on velin. 30 x 25 cm.

164 ***Si je mourais la bas (If I Died There),*** 1962. Woodcut on velin pur chiffon. 46 x 72 cm. Signed l/c: Planche de Remarque G.B.. Unique and monogrammed. Valier 181.

165 ***Théière sur fond gris (Tea Set on Gray Background),*** c. 1946/47. See color photo on inside back cover.

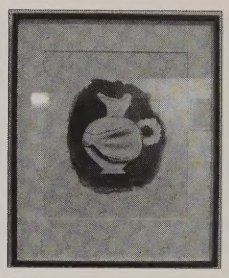
HENRI MATISSE (French, 1869-1954):

166 ***Le Coeur.*** Colored lithograph on BFK rives velin. 39 x 60 cm. Planche VII from the series "Jazz," Edition Anthese 2005 with flattened center fold. Printed at Imprimerie Idem-Mourlot. Edition of 1300.

167 ***L'enterrement de Pierrot.*** Colored lithograph on BFK rives velin. 39 x 60 cm. Planche X from the series "Jazz," Edition Anthese 2005 with flattened center fold. Printed at Imprimerie Idem-Mourlot. Edition of 1300.

168 ***Le lanceur de couteaux.*** Colored lithograph on BFK rives velin. 39 x 60 cm. Planche XV from the series "Jazz," Edition Anthese 2005 with flattened center fold. Printed at Imprimerie Idem-Mourlot. Edition of 1300.

158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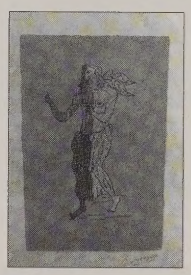
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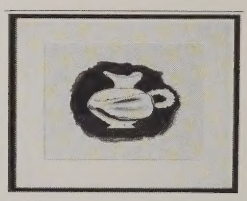
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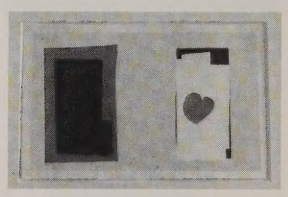
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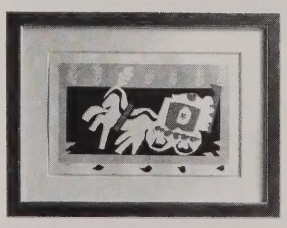
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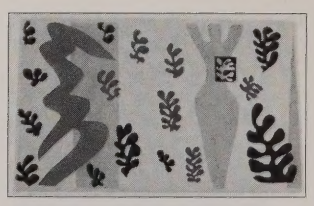
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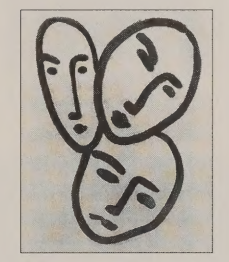

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177

169 ***Nude in Rocking Chair,*** 1913. Lithograph. 50.3 x 32.8 cm. Signed. Monogrammed: Epreuve d'artist Duthuit 410.

170 ***Virgin and Child.*** Lithograph on yellow ground. 25 x 39 cm. Signed l/r on a white border: H. Matisse.

171 ***Trois têtes,*** 1952. Aquatint. Withdrawn study for the front page of Rouveyre. "Apollinaire D.G." 25 by Henri Matisse.

PABLO PICASSO (Spanish, 1881-1973):

172 ***Jeune artiste sur fond vert (Le Pierrot).*** Colored litho on brown paper. 61 x 45 cm. Signed u/l.

173 ***Le Couple (Amours Feminines),*** 1951. Etching. 17 x 21.8 cm. Bloch 690. From the collection of Marina Picasso.

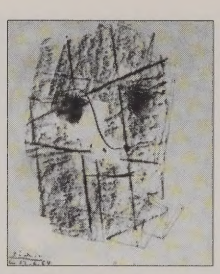
174 ***La Petite Corrida,*** 1957. Colored lithograph. 29.8 x 23.5 cm. Signed and dated l/l: Picasso 23.11.57. Bloch 839. Mourlot 302.

175 ***Les Saltimbanques, 1958.*** 21.5 x 17 cm. Signed and dated 5.3.58. Ed. no. 68/100. Rau 680.

176 ***Petite nue assise au miroir,*** 1947. Feather and brush on lithograph paper, smashed on stone. 31 x 48.5 cm. Dated: Dimanche 11.05.47. One of five epreuves d'artiste not included in the limited ed. of 50. Bloch 451. Mourlot 100.

177 ***Profil au fond noir,*** 1947. Chalk drawing from chalk feather and brush on velin. 56.7 x 38.3 cm. Dated 20.03.1947. Verso: Limited edition of 50.

178 ***Visage pour Daniel-Henry Kahnweiler,*** 1964. Lithograph. 28 x 19.5 cm. Signed and dated I/I: Picasso 12.[/17?].6.64. Bloch 1179. Mourlot 403. Edition of 1200.



178

## SCULPTURE

*The following bronze works of art were among 30 items stolen from the Fasenengalerie in Berlin, Germany during the New Year's holiday, December 31, 2008-January 1, 2009. *C09.0001. See also item nos. 157-178 above.:*

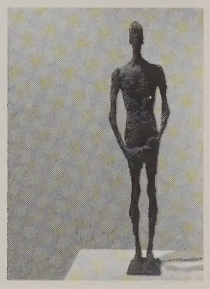
179 MAURITS CORNELIS ESCHER (Dutch, 1898-1972). ***Huelle (Cover).*** Cast for the artist's 100th birthday. Ed no. 32/390.

179

180 RICHARD HESS (German). ***Frau in Leder (Woman in Leather),*** 1981. 88 x 44 cm.

180

181 SUSANNE RAST (German). ***Vater mit Kind (Father with Child),*** 2001. H: 54 cm.



181

182 STEFAN VON REISWITZ (German). ***Der Bogenschuetze (The Archer).*** H: 32 cm.

182

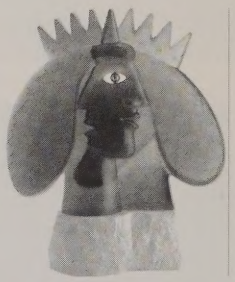
183 STEFAN VON REISWITZ (German). ***Kardinal Ratzinger.*** H: 28 cm.

183

184 SIR WILLIAM GOSCOMBE JOHN (Welsh, 1860-1952). ***Wife of the Artist.*** Bronze. H: 182 cm. *L08.794. Interpol no. 2007/22179-1.1. Stolen in England in 2007.

184

185 JOSE AURELIO (Portuguese, b. 1938) for Daum. ***Eternity.*** Glass and crystal. H: 41 cm. Ed. No. 52/375. *L08.794. Interpol no. 2007/44248-1.1. Stolen in Belgium in 2007.



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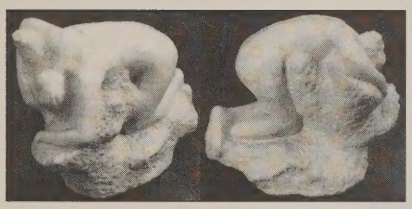

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186 FRÉDÉRIC AUGUSTE BARTHOLDI (French, 1834-1904). ***Liberty Enlightening the World,*** c. 1800. Terracotta and metal maquette miniature enclosed in a glass case. 20" x 10". Signed "ABartholdi" in ligature. *N08.539. Stolen from the storage space of a New York apartment building on February 16, 2008.

187 MARC CHAGALL (Russian/French, 1887-1985). ***Cat.*** Clay and terracotta. H: 12.3 cm. Signed. On the rear are two Chagall thumbprints. *L08.794. Interpol no. 39314-1.1. Stolen in Belgium in 2007.

188 PAUL HARDER (Canadian, contemporary). ***Steelhead Trout Coffee Table,*** c.2008. Bronze and glass. 19" x 26" x 54". On the base: "Harder" and Ed no. 1/110. *N08.472. Stolen from a vehicle in Port McNeil, British Columbia on July 18, 2008.

189 Attrib to. AUGUSTE RODIN (French, 1840-1917) and CAMILLE CLAUDEL (French, 1864-1943). ***Danaid.*** White marble with black inclusions. 24" x 24" x 16". *L08.794. Interpol no. 2008/13105-1.1. Stolen in France in 2008.

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*The following two sculptures by* AUGUSTE RODIN *(French, 1840-1917) were stolen in Argentina in 2006. *L08.794:*

190 ***Male Torso.*** Bronze. H: 20". Ed. No. 10/12. Foundry: Susse. Interpol no. 2006/7574-1.1.

191 ***Kneeling Woman.*** Bronze. H: 20". Ed no. 2/12. Foundry: Godard. Interpol no. 2006/7574-1.2.

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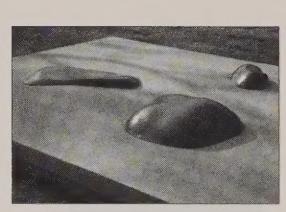
192 ROMAIN DE TIRTOFF ERTÉ (Russian/French, 1892-1990). ***Number One (Nude),*** c. 1988. Bronze. H: 20 ½". Ed no. 248/375. *N08.468. Stolen from a gallery in San Francisco, CA on August 2, 2008.

193 ISAMU NOGUCHI (American, 1904-1988). ***Garden Elements Sculpture,*** c.1962. Three bronze organic shapes set in a concrete base. Only one of the three shapes was removed from the base and sto len from the University of California Murphy Sculpture Garden in Los Angeles, CA on July 30, 2008. *N08.478.



193

## ANTIQUITIES

PRE-COLOMBIAN

194 ***Anthropomorphic Figure.*** (Wari culture, Andes, c.500-900 AD). Turquoise. 1.7 x 1.7 cm. *L08.794. Interpol no. 2008/25108-1.2. Stolen in Peru in 2008.

194

# MISSING ART

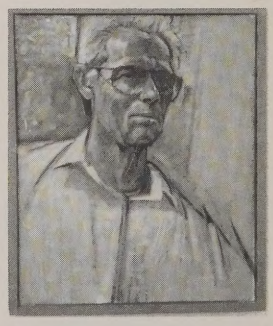
## PAINTINGS

*The following paintings by* ROBERT FRANCIS HUGENBERGER *(American, d. 2008) were reported missing from the late artist's home/studio in Sun City, CA on January 1, 2008. *N08.522:*

63 ***Nude Woman – Deco,*** 2004. Acrylic on canvas, 28" x 36".

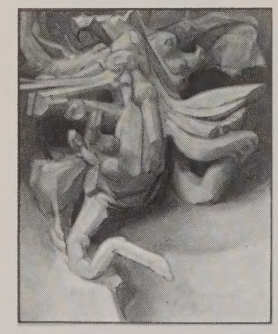
63

64 ***Self-Portrait Painting in Acrylic,*** 2001. Acrylic on canvas. 30" x 24". Signed verso.



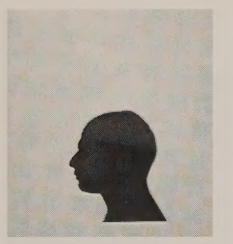
64

65 ***Manzanita Root,*** c.1975. Oil on canvas. 5" x 4" Signed l/r.



65

* Numbering for the year 2008 Cumulative Index of Missing Art began with issue, Vol. 10, no. 1.



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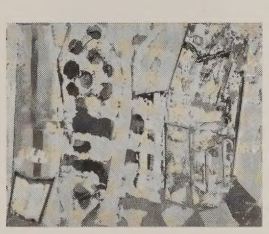


69

66 ALI KAZIM (Pakistani, contemporary). ***Topi Wallah on Animal Skin,*** 2008. Leather dyes on leather mounted on white-painted board. 26" x 23". *L08.616. Lost in transit between Lahore and London on April 2, 2008.

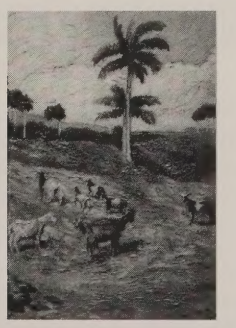
67 L.C. ARMSTRONG (American, b. 1954). ***Botanica over Bikini Island,*** 2001. Oil and lacquer. 42" x 36". *N08.574. Lost in transit in Illinois on August 11, 2008.

68 JULIAN ALDEN WEIR (American, 1852-1919). ***The Palm Leaf Fan,*** 1914. Oil on canvas. 34" x 28". Signed u/r. Verso might be marked with the museum accession no. 1928-63-10. On verso: 1928-63-10. *N08.571. Declared missing on September 29, 1965. Part of a long-term loan from the Philadelphia Museum of Art to Harcum Junior College, Bryn Mawr, PA, the painting was not returned on March 11, 1965 with the other works on loan.

69 C. MICHAEL NORTON (American, contemporary). ***Ornette,*** 2006. Acrylic on linen. 72" x 90". On verso: Signature, title, and date. *N08.494. Lost in transit between New York City and Beijing, China on August 3, 2008.

## ERRATUM

In the last issue of *IFAR Journal* (Vol. 10, no. 2), on page 58, the image for item 44 in Missing Art, JESUS ESCOBEDO'S ***Landscape with Palm Trees and Goats,*** was incorrect. The correct image appears below.



## MISSING ART

*The following paintings by* ROBERT MOTHERWELL *(American, 1915-1991) were reported missing in 2009. See also item nos. 78-80 listed under Works on Paper below:*

70 ***Untitled (Open in Black, Brown and White),*** c.1970. Acrylic on canvas. 24" x 36".

71 ***Open Study No. 7,*** 1968. Acrylic on canvas. 28" x 22".

72 ***Open Study No. 10,*** 1969. Acrylic and charcoal on canvas. 30" x 20".

73 ***Open No. 141: In Charcoal and Blue on Scarlet,*** 1970. Acrylic on canvas. 24" x 36".

74 ***I.H. Series No. 4,*** 1970. Acrylic on lithograph. 22 ¼" x 17".

75 ***Untitled (Black, Blue, Brown, White Open),*** c.1968-1973. Acrylic on canvas. 40" x 30".

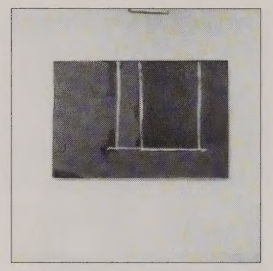
76 ***Untitled (Black, Blue, Brown Open),*** c.1968-1973. Acrylic on canvas. 40" x 30".

77 ***Untitled (Black, Blue, Brown, White Open),*** c.1968-1973. Acrylic on canvas. 40" x 30".

## WORKS ON PAPER

*The following works on paper by* ROBERT MOTHERWELL *(American, 1915-1991) were reported missing in 2009:*

78 ***Still-Life,*** 1958. Shellac and graphite on paper. 22 ½" x 28 ½".



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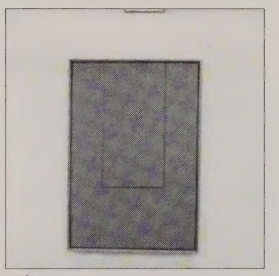

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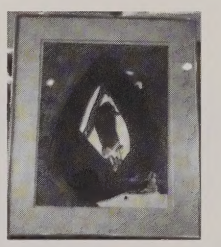

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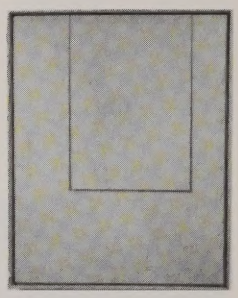

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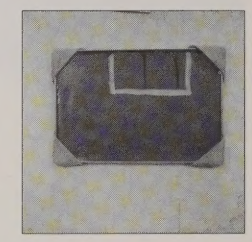

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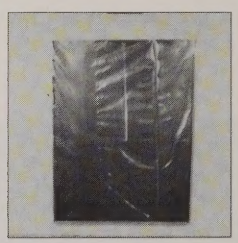

75

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80

79 ***Drawing,*** 1962. Ink on paper. 29" x 23".

80 ***Oval (Black Calligraphy),*** 1967. Ink on paper. 30 ½" x 22 ¼".

## RECOVERED ART

### PAINTINGS

Eight paintings stolen from the Noortman gallery in Maastricht, Switzerland on February 16, 1987 (*87.99; see *IFARreports*, May 1987) were reported recovered by Dutch police in a sting operation earlier this year. Some of the paintings had been folded and were recovered damaged. A ninth painting was destroyed after the theft. Police located the works after an attempt was made to sell them to the insurance company that had paid out approximately € 2.3 million after the theft.

31

32

31 JAN BRUEGHEL, THE YOUNGER. (Flemish, 1601-1678). ***Monkeys.*** Oil on copper. 9.5 x 7.0 cm.

32 EVA GONZALÈS (French, 1849-1883). ***Bouquet de fleurs.*** Oil on canvas. 35 x 25 cm.

33

34

33 MEINDERT HOBBEMA (Dutch, 1638-1709). ***The Watermill,*** 1662. Oil on panel. 59.5 x 84 cm. Destroyed.

34 CAMILLE PISSARRO (French, 1831-1903). ***Bords de la Seine à Bougival,*** 1871. Oil on canvas. 27 x 40 cm.

35

36

35 PIERRE AUGUSTE RENOIR (French, 1841-1919). ***La Clairière.*** Oil on canvas. 30.7 x 29 cm.

36 DAVID TENIERS, THE YOUNGER (Flemish, 1610-1690). ***Peasants Merrymaking Outside an Inn at Perck.*** Oil on canvas. 67 x 101 cm.

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* Numbering for the year 2008 Cumulative Index of Recovered Art began with issue, Vol. 10, no. 1.

37 PAUL DÉSIRÉ TROUILLEBERT (French, 1831-1900). ***Pêcheur près du moulin à eau.*** Oil on canvas. 46 x 62 cm.

37

38 WILLEM VAN DE VELDE, THE YOUNGER (Dutch, 1633-1707). ***An English Yacht Before a Moderate Breeze.*** Oil on canvas. 20.5 x 28 cm.

38

39 WILLEM VAN DE VELDE, THE YOUNGER (Dutch, 1633-1707). ***Dutch Vessels Near the Shore with a States Yacht Under Sail.*** Oil on canvas. 20.5 x 28 cm.

39

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40 GEORGES BRAQUE (French, 1882-1963). ***The Purple Teapot / La Théière Mauve sur la Nappe Rayée,*** 1953. Oil on canvas, 7 ½" x 12 ¾". Signed. *N08.124 / Recovery 992. Stolen from a New York gallery in 1969. Recovered from a London auction house in 2008 with the help of the ALR.

40

41 MARC-AURÈLE DE FOY SUZOR-COTÉ (Canadian, 1869-1937). ***Spring Landscape – Alaska,*** 1921. Oil on canvas. 80 x 100 cm. Signed. *N90.414 / Recovery 923. Stolen from a university in Canada on May 21, 1990. Recovered from a Canadian auction house in January / 2008 with the help of the ALR.

41

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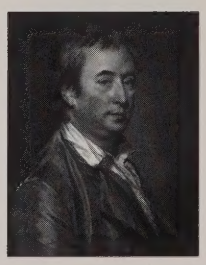
*The following two paintings, stolen from Somerset House in London during January/February 2008, were recovered by the Metropolitan Police during a warrant execution. *L08.203:*

42 JOHN THOMAS SERRES (English, 1759-1828). ***Shipping,*** 1821. Oil on canvas. 66.5 x 85.5 cm.

42

43 FRANCIS COTES (English, 1726-1770). ***Sir William Chambers; Architect of Somerset House,*** 1764. Oil on canvas. 59 x 45.5 cm.



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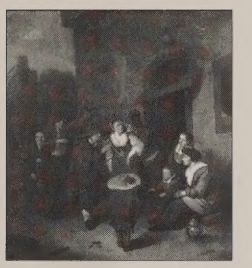

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*The following five paintings that were stolen from the Frans Hals Museum in Haarlem, The Netherlands on March 24, 2002 (*L02.465) were recovered during a police raid on a house in Den Bosch in September 2008. Three of the works were damaged, and three suspects were arrested:*

44 CORNELIS BEGA (Dutch, 1620-1664). ***Street Musicians in Front of an Inn.*** Oil on panel. 35 x 32.5 cm.

45 CORNELIS DUSART (Dutch, 1660-1704). ***Family Drinking in the Kitchen.*** Oil on panel. 48 x 56 cm.

46 JAN STEEN (Dutch, 1626-1679). ***The Quack,*** 1655. Oil on panel. 37.5 x 49 cm.

47 ADRIAEN VAN OSTADE (Dutch, 1610-1685). ***Charlatan on the Market (The Quack),*** 1648. Oil on panel. 27.5 x 22 cm.

48 ADRIAEN VAN OSTADE (Dutch, 1610-1685). ***The Jolly Toper.*** Oil on panel. 47 x 40 cm.

## WORKS ON PAPER

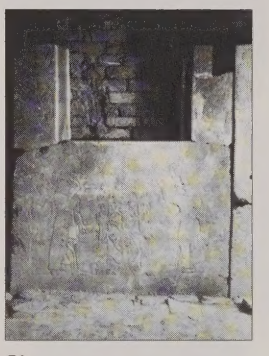
49 FRANCISCO DE GOYA (Spanish, 1746-1828). ***Tristes presentimientos de lo que ha de acontecer (Sad Premonitions of What Must Happen),*** c.1815. Engraving. Part of the artist's "Disasters of War" series. Stolen from an exhibition at the Gilberto Alzate Avendano Foundation in Bogota, Colombia on September 11, 2008 while on loan from the Goya Foundation in Spain. Recovered one month later in a hotel room in Bogota by police acting on a tip from an informant.

50 JOAN MIRÓ (Spanish, 1893-1983). ***Terre atteinte et soleil intact,*** 1973. Color aquatint. 67.9 x 53.3 cm. Signed l/r. Ed no. 15.50. Maeght editeur Paris. Prints: Morsang, Paris.*N91.336 / Recovery 975. Stolen from a private residence in Texas in June 1991. Recovered from an auction house in 2008 with the help of the ALR.

## RECOVERED ART

### ANTIQUITIES

51 Bas-relief fragment depicting a human-headed kneeling genius facing right. Looted from an archaeological site in Nimrud during the U.S.–led invasion of Iraq in 2003. (See Samuel M. Paley, "Nimrud, the War and the Antiquities Market," *IFAR Journal,* Vol. 6, nos. 1&2.) Returned to Iraq by Syria in July 2008. Fragment appears at upper left of bas-relief shown *in situ* in photo (left) of I-9 (position 9, Room I of the Northwest Palace of Ashurnasirpal II). Photograph c. 1970 from the Nimrud Archives, Warsaw, Poland. H. Lewakowa's drawing (right) also shows the bas-relief *in situ.* (After Paley and Sobolewski 1987, plate 1:3.)



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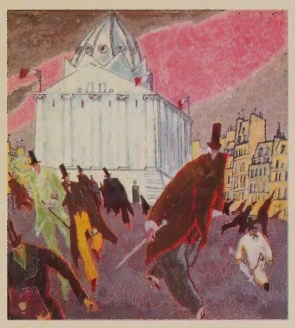

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## STOLEN ART

The following four paintings were stolen from a private residence in Los Angeles, CA on August 23, 2008. *N08.496. See also item nos. 132, 135, 154-155, pp. 57 and 59, this issue:

**131 LYONEL FEININGER** (American, 1871–1956). ***Fin de Séance,*** 1910. Oil on canvas. 95 x 85.5 cm. Signed u/l.

**133 CHAIM SOUTINE** (French, 1894-1943). ***La Femme en Rouge,*** 1926. Oil on canvas. 75.6 x 54.9 cm. Signed l/r.

**134 KEES VAN DONGEN** (Dutch, 1877-1968). ***Woman in Red Hat (Alicia Alanova),*** 1933. Oil on canvas. 64 x 53.3 cm. Signed l/r.

**136 HANS HOFMANN** (German, 1880-1966). ***Untitled (Blue Bottle),*** 1947. Oil on canvas. 123.19 x 152.4 cm. Signed and dated l/r.

---

**165 GEORGES BRAQUE** (French, 1882-1963) ***Théière sur fond gris (Tea Set on Gray Background),*** c. 1946/47. Colored lithograph. 31.7 x 50 cm. Valier 34. Mourlot 8. Draft print from the ed. of 75. Auvergne. *C09.0001. One of 30 items stolen from the Fasenengalerie in Berlin, Germany during the New Year's holiday, December 31, 2008-January 1, 2009. See also item nos. 157-183, pp. 59-62, this issue.


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